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MASSACHUSETTS REPORTS

197

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

DECEMBER 1907 — FEBRUARY 1908

HENRY WALTON SWIFT

REPORTER

BOSTON
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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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Hon. JOHN WILKES HAMMOND.
Hon. WILLIAM CALEB LORING.
Hon. HENRY KING BRALEY.
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ATTORNEY GENERAL

Hon. DANA MALONE.

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TABLE

OF THE CASES REPORTED.

Abbott (Dow *v.*) 283
Acker (Commonwealth *v.*) . 91
Allen *v.* Boston & Maine Railroad 298
——— *v.* Kidd 256
American Baptist Publication Society *v.* Lufkin 221
American Express Co. (Childs *v.*) 337
——— (Clark *v.*) 160
American Ins. Co. (Cutting *v.*) 131
American Woolen Co. (McTiernan *v.*) 238
Attorney General (Gill *v.*) . 232
——— *v.* New York, New Haven, & Hartford Railroad . 194
Austin *v.* Papanti 584
Ayer (Converse *v.*) 443
—— (Doherty *v.*) 241

Beirne *v.* Lawrence & Methuen Street Railway . . 173
Benson *v.* Hall 517
Bergman (Powers *v.*) . . . 39
Blinn (Nelson *v.*) 279
Bolton (Thompson *v.*) . . . 311
Boston (Jones *v.*) 66
——— (Mulvey *v.*) 178
——— *v.* Ocean Steamship Co. of Savannah 561
Boston & Maine Railroad (Allen *v.*) 299
Boston & Northern Street Railway (Miller *v.*) . . . 535
Boston Bar Association *v.* Hale 423
Boston Coal Co. (Wakefield *v.*) 527
Boston Elevated Railway (Casey *v.*) 440
——— (Kelly *v.*) 420
Boston Elevated Railway (Lanci *v.*) 32
——— (MacLaren *v.*) . . . 490
——— (McNamara *v.*) . . 383
——— (Minihan *v.*) . . . 367
——— (Soebel *v.*) 46
Boston Ins. Co. (Quill *v.*) . . 216
Boston Safe Deposit & Trust Co. *v.* Parker 70
Bowers (Williams *v.*) . . . 565
Bresnahan Shoe Machinery Co. (United Shoe Machinery Co. *v.*) 206
Brodie *v.* Rockport Granite Co. 147
Brookline (Stimson *v.*) . . . 568
Brooks *v.* Reynolds 94
——— *v.* Shaw 376
Buck & Co. (Donahue *v.*) . . 550
Budro *v.* Burgess 74
Burgess (Budro *v.*) 74
Burr *v.* Massachusetts School for Feeble-Minded . . . 357

Cambridge (Taintor *v.*) . . 412
Cambridge Electric Light Co. (Pembroke *v.*) 477
Cambridge, Mayor of *v.* Railroad Commissioners . . . 574
Cammett *v.* Haverhill . . . 76
Canfield (Dann *v.*) 591
Carver Cotton Gin Co. (Strong *v.*) 53
Casey *v.* Boston Elevated Railway 440
Chapin (Russo *v.*) 64
Childs *v.* American Express Co. 337
Citizens' Electric Street Railway (Sauvan *v.*) 176

Digitized by Google

Clark *v.* American Express Co. 160
——— *v.* Gulesian 492
Cobb (Peaks *v.*) 554
Commonwealth *v.* Acker . . 91
——— *v.* Delano 166
——— (McArthur Brothers Co. *v.*) 137
——— *v.* Morrison 199
——— *v.* Schwartz 107
Converse *v.* Ayer 443
Cook *v.* Enterprise Transportation Co. 7
——— (Lima *v.*) 11
Crawford (Davis *v.*) . . . 309
Cummings (Reardon *v.*) . . 128
——— (Wood *v.*) 80
Cutting *v.* American Ins. Co. . 131

Dann *v.* Canfield 591
Davenport (Jaquith *v.*) . . . 397
Davis *v.* Crawford 309
Davison *v.* Maryland Casualty Co. 167
Day *v.* Richards 86
Delano (Commonwealth *v.*) . 166
Dickey *v.* Trustees of Putnam Free School 468
Doherty *v.* Ayer 241
Donahue *v.* Buck & Co. . . 550
Dow *v.* Abbott 283
Dyer *v.* Melrose 99

Ellis (Rowley *v.*) 391
Elmes (McCombs *v.*) . . . 19
Enterprise Transportation Co. (Cook *v.*) 7

Fall River (Hyde *v.*) . . . 4
Fall River Iron Works Co. (Heffernan *v.*) 28
Ferguson Co. (Jaehnig *v.*) . 364
Fidelity Ins. Co. (Newburyport *v.*) 596
Fieles (Searles *v.*) 343
Fitzpatrick Shoe Co. (Pfister & Vogel Co. *v.*) 277
Fore River Ship Building Co. (Lukkonen *v.*) 586

Gallagher *v.* Watertown . . 467
Gas & Electric Light Commissioners (Weld *v.*) 556
Gill *v.* Attorney General . . 232
Glidden (Herrick *v.*) . . . 156
Gordon *v.* Levine 263
Gorham *v.* Moor 522
Gould Wire Cord Co. (McKenna *v.*) 406
Greene (Smith *v.*) 16
Guffey Petroleum Co. (Johnson *v.*) 302
Gulesian (Clark *v.*) 493
Gurney *v.* Tenney 457

Hadden *v.* Somerville . . . 480
Hale (Boston Bar Association *v.*) 423
Hall (Benson *v.*) 517
—— *v.* Middleby 485
Hatch *v.* United States Casualty Co. 101
Haverhill (Cammett *v.*) . . 76
Heffernan *v.* Fall River Iron Works Co. 28
——— (Rosenberg *v.*) . . . 151
Henry (Parsons *v.*) 504
Herrick *v.* Glidden 156
Hey *v.* Prime 474
Hillery (Leominster Gas Light Co. *v.*) 267
Hoyt (Kennedy *v.*) 361
Hudson Savings Bank (Mentzer *v.*) 325
Hyde *v.* Fall River 4

Intercolonial Railway (Mason *v.*) 349

Jaehnig *v.* Ferguson Co. . . 364
Jagoe *v.* Robinson 416
Jaquith *v.* Davenport . . . 397
Johnson *v.* Guffey Petroleum Co. 302
Jones *v.* Boston 66
Jordan *v.* New England Structural Co. 43

Kehoe (Palatine Ins. Co. *v.*) 354
Kelley (Paine *v.*) 22
Kelly *v.* Boston Elevated Railway 420
Kennedy *v.* Hoyt 361
Kidd (Allen *v.*) 256

Digitized by Google

Lanci *v.* Boston Elevated Railway 32
Landrigan *v.* Taylor-Goodwin Co. 582
Lawrence & Methuen Street Railway (Beirne *v.*) . . . 173
Le Baron *v.* Old Colony Street Railway 289
Legge *v.* New York, New Haven, & Hartford Railroad . 88
Leominster Gas Light Co. *v.* Hillery 267
Levine (Gordon *v.*) 263
Lima *v.* Cook 11
Lindenbaum *v.* New York, New Haven, & Hartford Railroad 314
Low *v.* Low 158
Lufkin (American Baptist Publication Society *v.*) . . . 221
Lukkonen *v.* Fore River Ship Building Co. 586

McArthur Brothers Co. *v.* Commonwealth 137
McCallum *v.* Simplex Electrical Co. 388
McCarthy *v.* Morse 332
McCombs *v.* Elmes 19
McCurdy *v.* McCurdy . . . 248
McDonnell, petitioner . . . 252
McGivern *v.* Steele 164
McKenna *v.* Gould Wire Cord Co. 406
MacLaren *v.* Boston Elevated Railway 490
McNamara *v.* Boston Elevated Railway 383
McTiernan *v.* American Woolen Co. 238
Maryland Casualty Co. (Davison *v.*) 167
Mason *v.* Intercolonial Railway 349
Massachusetts School for Feeble-Minded (Burr *v.*) . . . 357
Mayor of Cambridge *v.* Railroad Commissioners . . . 574
Melrose (Dyer *v.*) 99
Mentzer *v.* Hudson Savings Bank 325
Merrill *v.* Post Publishing Co. 185
Middleby (Hall *v.*) 485
Miller *v.* Boston & Northern Street Railway 535
Milton (Wood *v.*) 531
Minihan *v.* Boston Elevated Railway 367
Mitchell *v.* Thomas 347
Moor (Gorham *v.*) 522
Morrison (Commonwealth *v.*) 199
Morse (McCarthy *v.*) . . . 332
——— *v.* Street Commissioners 292
Mulvey *v.* Boston 178
Murch (Stimpson *v.*) . . . 381

Nelson *v.* Blinn 279
Newburyport *v.* Fidelity Ins. Co. 596
New England Structural Co. (Jordan *v.*) 43
New York, New Haven, & Hartford Railroad (Attorney General *v.*) 194
——— (Legge *v.*) 88
——— (Lindenbaum *v.*) . . 314
——— (Pearlstein *v.*) . . . 578
North End Savings Bank *v.* Snow 339

Ocean Steamship Co. of Savannah (Boston *v.*) . . . 561
Old Colony Street Railway (Le Baron *v.*) 289
——— (Sullivan *v.*) . . . 512

Paine *v.* Kelley 22
Palatine Ins. Co. *v.* Kehoe . 354
Papanti (Austin *v.*) 584
Parker (Boston Safe Deposit & Trust Co. *v.*) 70
——— (Price *v.*) 1
Parsons *v.* Henry 504
Patterson *v.* Patterson . . . 112
Peaks *v.* Cobb 554
Pearlstein *v.* New York, New Haven, & Hartford Railroad 578
Pembroke *v.* Cambridge Electric Light Co. 477
Pfister & Vogel Co. *v.* Fitzpatrick Shoe Co. 277
Police Commissioner (Round *v.*) 218

Digitized by Google

Post Publishing Co. (Merrill v.) 185
Postal Telegraph Cable Co. (Wheelock v.) 119
Powers v. Bergman 89
Price v. Parker 1
Prime (Hey v.) 474
Putnam v. Southworth . . . 270
Putnam Free School (Dickey v.) 468

Quill v. Boston Ins. Co. . . 216

Railroad Commissioners (Mayor of Cambridge v.) 574
Reardon v. Cummings . . . 128
Reynolds (Brooks v.) . . . 94
Richards (Day v.) 86
Richstein v. Welch 224
Robinson (Jagoe v.) 416
Rockport Granite Co. (Brodie v.) 147
Rosenberg v. Heffernan . . 151
Round v. Police Commissioner 218
Rowley v. Ellis 391
Russo v. Chapin 64

Sauvan v. Citizens' Electric Street Railway 176
Schlatter v. Young 36
Schwartz (Commonwealth v.) 107
Searles v. Fieles 343
Shaw (Brooks v.) 376
Shea v. Whitman 374
Simplex Electrical Co. (McCallum v.) 388
Smith v. Greene 16
Snow (North End Savings Bank v.) 339
Soebel v. Boston Elevated Railway 46
Somerville (Hadden v.) . . 480
Southworth (Putnam v.) . . 270
Steele (McGivern v.) . . . 164
Stimpson v. Murch 381
Stimson v. Brookline . . . 568
Stone (Whippen v.) 519
Street Commissioners (Morse v.) 292
Strong v. Carver Cotton Gin Co. 53
Sullivan v. Old Colony Street Railway 512

Taintor v. Cambridge . . . 412
Taylor-Goodwin Co. (Landrigan v.) 582
Tenney (Gurney v.) . . . 457
Thacher v. Weston 143
Thomas (Mitchell v.) . . . 347
Thompson v. Bolton 311
——— v. Thornton 273
Thornton (Thompson v.) . . 273
Trustees of Putnam Free School (Dickey v.) . . . 468

United Shoe Machinery Co. v. Bresnahan Shoe Machinery Co. 206
United States Casualty Co. (Hatch v.) 101

Wakefield v. Boston Coal Co. 527
Washburn v. White . . . 540
Watertown (Gallagher v.) . 467
Welch (Richstein v.) . . . 224
Weld v. Gas & Electric Light Commissioners 556
Wellesley & Boston Street Railway (Whitney v.) . . 495
Weston (Thacher v.) . . . 143
Wheelock v. Postal Telegraph Cable Co. 119
Whippen v. Stone 519
White (Washburn v.) . . . 540
Whitman (Shea v.) 374
Whitney v. Wellesley & Boston Street Railway 495
Williams v. Bowers 565
Wood v. Cummings 80
——— v. Milton 531

Young (Schlatter v.) . . . 36

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TABLE OF CASES

CITED BY THE COURT.

Abbott *v.* Bradstreet, 3 Allen, 587 73
——— *v.* North Andover, 145 Mass. 484 604
Adams *v.* Morgan, 150 Mass. 143 59
——— *v.* Natick, 13 Allen, 429 247
Adasken *v.* Gilbert, 165 Mass. 443 553
Ahearn *v.* Boston Elevated Railway, 194 Mass. 350 422
Akerly *v.* Vilas, 24 Wis. 165 140
Albers *v.* Western Union Telegraph Co. 98 Iowa, 51 124
Alexander *v.* Pitts, 7 Cush. 508 567
Alger *v.* Lowell, 3 Allen, 402 375
Allen *v.* Boardman, 193 Mass. 284 276
——— *v.* Boston, 159 Mass. 324 203
——— *v.* Clark, 190 Mass. 556 509
Allin *v.* Connecticut River Lumber Co. 150 Mass. 560 475
Alvord *v.* Collin, 20 Pick. 418 567
Andrews *v.* Jackson, 168 Mass. 266 466
——— *v.* Landers, 72 Fed. Rep. 666 62
Anglo-American Land Co. *v.* Dyer, 181 Mass. 503 453
Arnold *v.* Teel, 182 Mass. 1 466
Atchison, Topeka & Santa Fe Railroad *v.* Chance, 57 Kans. 40 517
Atkinson *v.* Saltsman, 3 Ind. App. 189 52
Atkyns *v.* Burrows, 1 Pet. Adm. 244 564
Atlantic National Bank *v.* Harris, 118 Mass. 147 604
Attorney General *v.* Herrick, 190 Mass. 307 572
——— *v.* Great Northern Railway, 1 Dr. & Sm. 154 197
——— *v.* Mid Kent Railway, L. R. 3 Ch. 100 197
——— *v.* Pitcher, 183 Mass. 513 197
——— *v.* Sullivan, 163 Mass. 446 196
——— *v.* Tudor Ice Co. 104 Mass. 239 197
——— *v.* Walworth Light & Power Co. 157 Mass. 86 559
Ayers *v.* Farwell, 196 Mass. 349 85
Babcock *v.* Wolf, 70 Iowa, 676, 679 140
Bacon *v.* Hooker, 177 Mass. 385 364
Bailey *v.* Cambridge, 174 Mass. 188 488
——— *v.* Marden, 193 Mass. 277 89
Baker *v.* Fall River, 187 Mass. 53 244
——— *v.* Sutton, 1 Keen, 224 285
Balch *v.* Stone, 149 Mass. 39 277
Baldwin *v.* Flower, 3 Mod. 120 191
——— *v.* Foster, 138 Mass. 449 439
——— *v.* United States Telegraph Co. 45 N. Y. 744 126
Ball *v.* Holland, 189 Mass. 369 224
Baltimore & Ohio Railroad *v.* Bates, 119 U. S. 464 140
Banks *v.* Braman, 188 Mass. 367 35, 125
——— *v.* Highland Street Railway, 136 Mass. 485 337
Barker *v.* Loring, 177 Mass. 389 823
Barnes *v.* Hurd, 11 Mass. 59 476
Barnstable Savings Bank *v.* Boston, 127 Mass. 254 415
Barrell *v.* Benjamin, 15 Mass. 354 26
Barrett *v.* Marsh, 126 Mass. 218 287
Barry *v.* Boston Elevated Railway, 194 Mass. 265 174
Bassett *v.* Nickerson, 184 Mass. 169 287
——— *v.* Rogers, 162 Mass. 47 59
Bates *v.* Dewson, 128 Mass. 334 276
Baxter *v.* Doe, 142 Mass. 558 563
Beal *v.* Lowell & Dracut Street Railway, 157 Mass. 444 262, 503
Beale *v.* Old Colony Street Railway, 196 Mass. 119 176
Beers *v.* McGinnis, 191 Mass. 279 364
Beirne *v.* Lawrence & Methuen Street Railway, 197 Mass. 173 301
Bennett *v.* Bennett, 116 N. Y. 584 180
——— *v.* Everett, 191 Mass. 364 468
Berkshire Ins. Co. *v.* Sturgis, 13 Gray, 177 356
Bernheimer *v.* Converse, 206 U. S. 516 453
Berry *v.* Ramsdall, 4 Met. (Ky.) 292 185
Bigelow *v.* Bemis, 2 Allen, 496 181

Digitized by Google

Bishop v. Journal Newspaper Co. 168 Mass. 327 190, 262, 508
Bjornquist v. Boston & Albany Railroad, 185 Mass. 130 35, 125
Black v. New York, New Haven, & Hartford Railroad, 193 Mass. 448 396
Blackie v. Hudson, 117 Mass. 181 297
Blackwell v. Old Colony Railroad, 122 Mass. 1 573
Blaisdell v. Gladwin, 4 Cush. 378 41
——— v. Winthrop, 118 Mass. 138 534
Blake v. Bolte, 31 N. Y. Supp. 124 100
——— v. Everett, 1 Allen, 248 42
Bliss v. New York Central & Hudson River Railroad, 160 Mass. 447 386
Blodgett v. Boston, 8 Allen, 237 205, 247
Borley v. Allison, 181 Mass. 246 51
Boston Bar Association v. Casey, 196 Mass. 100 437
Boston Electric Light Co. v. Boston Terminal Co. 184 Mass. 566 203
Bostwick v. Hess, 80 Ill. 138 147
Bovee v. Danville, 53 Vt. 183 517
Bowes v. Boston, 155 Mass. 344 482, 539
Boyle v. Edmands, 114 Mass. 378 231
Bradbury v. Fire Ins. Association, 80 Maine, 396 356
Bradford v. Storey, 189 Mass. 104 289
Branahan v. Hotel Co. 39 Ohio St. 333 204
Brennan v. Standard Oil Co. 187 Mass. 376 35
Brevoort v. Detroit, 24 Mich. 322 297
Brewster v. Sherman, 195 Mass. 222 559
Briggs v. Light-boats, 11 Allen, 157 351
Brigham v. Bigelow, 12 Met. 268 181
——— v. Este, 2 Pick. 420 130
Brinkley v. Platt, 40 Md. 529 466
Broadway National Bank v. Baker, 176 Mass. 294 455
Brown v. Brown, 174 Mass. 197 544
——— v. Henry, 172 Mass. 559 125
Brunelle v. Lowell Electric Light Co. 188 Mass. 493 337
Brunswick Gas Light Co. v. United Gas, Fuel & Light Co. 85 Maine, 532 558
Bullard v. American Express Co. 107 Mich. 695 561
Burt v. Wigglesworth, 117 Mass. 302 69
Buss v. Putney, 38 N. H. 44 61
Butler v. Manhattan Railway, 143 N. Y. 417 517
——— v. Toledo, 5 Ohio St. 225 297
Butterick, petitioner, 185 Mass. 107 269
Byington v. Simpson, 134 Mass. 169 380

Cadwell v. Blake, 6 Gray, 402 494
Cahn v. Western Union Telegraph Co. 48 Fed. Rep. 810 127
California v. Central Pacific Railroad, 127 U. S. 1 197
Call v. Hagger, 8 Mass. 423 282
Callahan v. Woodbridge, 171 Mass. 595 251
Callender, McAuslan & Troup Co. v. Flint, 187 Mass. 104 59
Calvin v. Huntley, 178 Mass. 29 565
Cambridge v. County Commissioners, 117 Mass. 79 415
Cammett v. Haverhill, 197 Mass. 76 313
Campbell v. Boston, 189 Mass. 7 214, 467, 530
——— v. Fetterman, 20 W. Va. 398 543
——— v. Holt, 115 U. S. 620 454
Candee v. Western Union Telegraph Co. 34 Wis. 471 127
Canning v. Williamstown, 1 Cush. 451 516
Cardell v. Lawton, 16 Vt. 606 52
Carlton v. Pierce, 1 Allen, 26 363
Carpenter v. Farnsworth, 106 Mass. 561 602
——— v. Holcomb, 105 Mass. 280 18
——— v. New York, New Haven, & Hartford Railroad, 184 Mass. 98 140
Carr v. Brown, 20 R. I. 215 281
—— v. Richardson, 157 Mass. 576 15
Carroll v. New York, New Haven, & Hartford Railroad, 182 Mass. 237 411
Casey v. Fitchburg, 162 Mass. 321 313
Caswell v. Boston Elevated Railway, 190 Mass. 527 35
Cawley v. Jean, 189 Mass. 220 511
Cazneau v. Fitchburg Railroad, 161 Mass. 355 90
Central Transportation Co. v. Pullman's Palace Car Co. 139 U. S. 24 558
Chace v. Ladd, 153 Mass. 126 224
——— v. Sherman, 119 Mass. 387 159
Chamberlain v. Preble, 11 Allen, 370 231
Chapin v. Kingsbury, 135 Mass. 580 510
——— v. ———, 138 Mass. 194 510
Chapman v. Briggs, 11 Allen, 546 509
Chappell v. McKnight, 108 Ill. 570 147
Chaput v. Haverhill, Georgetown & Danvers Street Railway, 194 Mass. 218 292
Chase v. Phillips, 153 Mass. 17 508
Chicago Gas Light Co. v. Peoples' Gas Light Co. 121 Ill. 530 558
Childs v. American Express Co. 197 Mass. 387 318
Chisholm v. Donovan, 188 Mass. 378 411
Clapp v. Hale, 112 Mass. 368 265
——— v. Houg, 12 N. D. 600 281
Clark v. Clark, 168 Mass. 523 524
——— v. Ward, 7 Gray, 409 27
——— v. Williams, 190 Mass. 219 273
Clay v. Iseminjer, 187 Penn. St. 108 184
—— v. ———, 185 U. S. 55 184
Clement v. Western Union Telegraph Co. 137 Mass. 463 125
Cobb v. Covenant Mutual Benefit Association, 153 Mass. 176 503
Codman v. Brigham, 187 Mass. 309 236
Cody v. Adams, 7 Gray, 59 27

Digitized by Google

Cohen v. Mayor of New York, 113 N. Y. 532 205
Cole v. Cassidy, 138 Mass. 437 466
—— v. Western Union Telegraph Co. 38 Minn. 227 124
Coleman v. Parker, 114 Mass. 30 87
Collector, The, v. Day, 11 Wall. 113 99
Collins v. Denison, 12 Met. 549 466
—— v. Greenfield, 172 Mass. 78 553
—— v. Ham, 177 Mass. 444 69
—— v. ——, 188 Mass. 53 69
Commissioners of Elizabeth, In re, 20 Vroom, 488 297
Commonwealth v. Brooks, 109 Mass. 355 204
—— v. Caldwell, 190 Mass. 355 345
—— v. Collberg, 119 Mass. 350 85
—— v. Danziger, 176 Mass. 290 390
—— v. Dill, 160 Mass. 536 166
—— v. Ellis, 158 Mass. 555 201
—— v. Farnum, 114 Mass. 267 111
—— v. Fitchburg Railroad, 12 Gray, 180 560
—— v. Fitzgerald, 2 Allen, 297 526
—— v. Giles, 1 Gray, 466 42
—— v. Hana, 195 Mass. 262 201
—— v. Hyland, 155 Mass. 7 323
—— v. Johnson, 188 Mass. 382 7, 503
—— v. King, 13 Met. 115 204
—— v. McNeese, 156 Mass. 231 323
—— v. Matthews, 122 Mass. 60 204
—— v. ——, 129 Mass. 485 526
—— v. Mechanics Ins. Co. 112 Mass. 192 142
—— v. Meserve, 156 Mass. 61 255
—— v. Millinian, 13 Serg. & R. 403 205
—— v. Morris, 176 Mass. 19 111
—— v. Ober, 12 Cush. 439 111, 201
—— v. Reid, 175 Mass. 325 201, 345
—— v. Richards, 18 Pick. 434 165
—— v. Scott, 123 Mass. 222 466
—— v. Snelling, 15 Pick. 321 41
—— v. Strauss, 191 Mass. 545 390
—— v. Wentworth, 4 Clark, (Pa.) 324 205
—— v. Wilkinson, 16 Pick. 175 204
—— v. Wood, 4 Gray, 11 42
Como v. Worcester, 177 Mass. 543 208
Connolly v. Bolster, 187 Mass. 266 170
—— v. New York & New England Railroad, 158 Mass. 8 175
Conover v. Bird, 27 Vroom, 228 141
Conrad v. Western Union Telegraph Co. 162 Penn. St. 204 124
Consolidated Lasting Machine Co. v. Bradley, 171 Mass. 127 231
Constitution, The, L. R. 4 P. D. 39 352
Cook v. Bartlett, 179 Mass. 576 503
—— v. Brown, 125 Mass. 503 27
—— v. Farrington, 10 Gray, 70 269
Corcoran v. Higgins, 194 Mass. 291 475
Cormerais v. Wesselhoeft, 114 Mass. 550 117
Costigan v. Lunt, 127 Mass. 354 165
Cotter v. Boston & Northern Street Railway, 190 Mass. 302 232
Conghlan v. Cambridge, 166 Mass. 268 30
Covell v. Bostwick, 39 Fed. Rep. 421 62
Cowen v. Kirby, 180 Mass. 504 164
Coy v. Indianapolis Gas Co. 146 Ind. 655 557
Crafts v. Belden, 99 Mass. 535 363
Crane v. Chicago & Northwestern Railway, 74 Iowa, 330 561
Cranson v. Goss, 107 Mass. 439 265
Cronan v. Woburn, 185 Mass. 91 27
Cropp v. Tilney, 3 Salk. 226 191
Croucher v. Oakman, 3 Allen, 185 563
Crowley v. Pacific Mills, 148 Mass. 228 521
Cudahy Packing Co. v. New Amsterdam Casualty Co. 132 Fed. Rep. 623 172
Cunningham v. Pattee, 99 Mass. 248 268
Cunnuis v. Reading School District, 206 Penn. St. 469 280
—— v. ——, 198 U. S. 458 280
Curtis, Matter of, 142 N. Y. 219 251
—— v. Aspinwall, 114 Mass. 187 18
Cushing v. Bedford, 125 Mass. 526 205
Custance v. Bradshaw, 4 Hare, 315 250
Cutter v. Hamlen, 147 Mass. 471 476
Cutting v. Shelburne, 193 Mass. 1 313

Dakin v. Allen, 8 Cush. 33 543, 549
—— v. Savage, 172 Mass. 23 15
Daly v. New Jersey Steel & Iron Co. 155 Mass. 1 590
Damon v. Boston, 149 Mass. 147 247, 375
Dana v. Dana, 185 Mass. 156 224
Danforth v. Groton Water Co. 178 Mass. 472 454
Daniels v. New York, New Haven, & Hartford Railroad, 183 Mass. 393 515
—— v. Ripley, 10 Mich. 237 544
Dann v. Spurrier, 3 Bos. & P. 399 287
Darling v. Wells, 1 Cush. 508 181
Davenport v. Coltman, 9 M. & W. 481 593
Davis v. Longmeadow, 169 Mass. 551 539
Dawes v. Swan, 4 Mass. 208 287
Day v. Caton, 119 Mass. 513 473
—— v. Lawrence, 167 Mass. 371 555
Debinson v. Emmons, 158 Mass. 592 87
De Friest v. Bradley, 192 Mass. 346 268
De Haber v. Queen of Portugal, 17 Q. B. 171 352
Denfield, petitioner, 156 Mass. 265 346
Derry v. Flitner, 118 Mass. 131 27
Desmond v. Young, 173 Mass. 90 510
Devine v. Murphy, 168 Mass. 249 323
District Township of Sidney v. Des Moines Ins. Co. 75 Iowa, 647 41
Dixon v. Amerman, 181 Mass. 430 476

Digitized by Google

Dobbins *v.* Commissioners of Erie County, 16 Pet. 435 99
Dodge *v.* Boston & Bangor Steamship Co. 148 Mass. 207 90
——— *v.* Perkins, 9 Pick. 368 604
Dorgan *v.* Boston, 12 Allen, 223 415
Dow *v.* Long, 190 Mass. 138 190
Dresel *v.* Jordan, 104 Mass. 407 18
Driscoll *v.* Towle, 181 Mass. 416 80, 530
Dudley *v.* Keith, 153 Mass. 104 128
Duffee *v.* Boston Elevated Railway, 191 Mass. 563 476
Dunbar *v.* Boston & Providence Railroad, 181 Mass. 383 454
——— *v.* Hollinshead, 10 Wis. 505 52
Duncan *v.* Cobb, 32 Minn. 460 184
Dunham *v.* Townsend, 110 Mass. 440 549
Durant *v.* Burt, 98 Mass. 161 508
Duryea *v.* Harvey, 183 Mass. 429 87

Eames *v.* Prentice, 8 Cush. 337 364
Earle *v.* Kingsbury, 3 Cush. 206 489
Earnshaw *v.* Whittemore, 194 Mass. 187 494
Eaton *v.* Supervisors, 40 Wis. 668 184
Edgerly *v.* Edgerly, 112 Mass. 175 117
Edmunds *v.* Bushell, L. R. 1 Q. B. 97 880
Edwards *v.* West, 7 Ch. D. 858 147
——— *v.* Worcester, 172 Mass. 104 524
El Dorado, The, 1 Lowell, 289 564
Ellis *v.* American Telegraph Co. 13 Allen, 226 125
——— *v.* Page, 7 Cush. 161 276
——— *v.* Thayer, 183 Mass. 309 552
English *v.* English, 4 Stew. 543 439
——— *v.* Franklin Ins. Co. 55 Mich. 273 356
Esty *v* Clark, 101 Mass. 36 276
Eureka Co. *v.* Bailey Co. 11 Wall. 488 62
Eustis *v.* Milton Street Railway, 183 Mass. 586 203
Evans *v.* Crosbie, 15 Sim. 600 593
Evensen *v.* Lexington & Boston Street Railway, 187 Mass. 77 35, 175, 581
Ewell *v.* Daggs, 108 U. S. 143 454

Fairweather *v.* McKim, 168 Mass. 103 199
Farnam *v.* Brooks, 6 Pick. 212 386
Farnum *v.* Buffum, 4 Cush. 260 567
Farquhar *v.* Farquhar, 194 Mass. 400 192
Faulkner *v.* Boston & Maine Railroad, 187 Mass. 254 339
Faxon *v.* Faxon, 174 Mass. 509 287
Fay *v.* Fay, 1 Cush. 93 287
Fee *v.* Orient Fertilizing Co. 36 Fed. Rep. 509 564
——— *v.* Orient Guano Manuf. Co. 44 Fed. Rep. 430 564
Feeney *v.* York Manuf. Co. 189 Mass. 336 552, 553
Feital *v.* Middlesex Railroad, 109 Mass. 398 373
Feneff *v.* Boston & Maine Railroad, 196 Mass. 575 318
Fifty Associates *v.* Howland, 11 Met. 99 489
Fillebrown *v.* Hayward, 190 Mass. 472 603
Finlay *v.* Boston, 196 Mass. 267 199
Finnegan *v.* Winslow Skate Manuf. Co. 189 Mass. 580 337
First National Bank *v.* Winona Plow Co. 58 Minn. 167 453
Fitchburg Railroad *v.* Fitchburg, 121 Mass. 132 414
Fitzgerald *v.* Boston Elevated Railway, 194 Mass. 242 174, 301
——— *v.* Libby, 142 Mass. 235 269
Flagg *v.* Bradford, 181 Mass. 315 139
Flynn *v.* Butler, 189 Mass. 377 27
Foley *v.* Pettee Machine Works, 149 Mass. 294 411
Forbes *v.* Tuckerman, 115 Mass. 115 508
Force *v.* Martin, 122 Mass. 5 525
Ford *v.* Eastern Bridge & Structural Co. 193 Mass. 89 552
——— *v.* Parr, 2 Wils. 21 141
Fowler *v.* Gardner, 169 Mass. 505 78
Fox *v.* Gibbs, 86 Maine, 87 235
Foye *v.* Patch, 132 Mass. 105 282
Frankel *v.* Frankel, 173 Mass. 214 117
Franklin Savings Bank *v.* Cochrane, 182 Mass. 586 341
Freedley *v.* French, 154 Mass. 339 386
Freeman *v.* Weeks, 45 Mich. 335 571
French *v.* Boston Coal Co. 195 Mass. 384 530
——— *v.* Butler, 89 Mich. 79 544
Frick's appeal, 101 Penn. St. 485 147
Frothingham *v.* Shaw, 175 Mass. 59 251
Fullam *v.* Wright & Colton Wire Cloth Co. 196 Mass. 474 494
Fuller *v.* Somerville, 186 Mass. 556 414
Fulton *v.* Andrew, L. R. 7 H. L. 448 823

Gale *v.* Chase National Bank, 104 Fed. Rep. 214 604
Galpin *v.* Critchlow, 112 Mass. 339 140
Gamble *v.* Accident Ins. Co. 4 Ir. Rep. C. L. 204 106
Garant *v.* Cashman, 183 Mass. 18 553
Gargano *v.* Pope, 184 Mass. 571 66
Gas Light Co. of Baltimore *v.* Colliday, 25 Md. 1 553
George *v.* Clark, 186 Mass. 426 281
——— *v.* Kent, 7 Allen, 16 269
Gerry *v.* Gerry, 11 Gray, 381 508
Gethin *v.* Allen, 23 L. R. (Ir.) 236 593
Gibbs *v.* Consolidated Gas Co. of Baltimore, 130 U. S. 396 558
Gifford *v.* Westport, 190 Mass. 323 204
Giles *v.* Comstock, 4 Comst. 270 490
Gilkie *v.* Marsh, 186 Mass. 336 287

Digitized by Google

Gilman v. Deerfield, 15 Gray, 577 313
——— v. Haven, 11 Cush. 330 230
Gleason v. Smith, 172 Mass. 50 411
Glenn v. Williams, 60 Md. 93 455
Glynn v. Moran, 174 Mass. 233 59
Goddard v. Rawson, 130 Mass. 97 248
——— v. Smithett, 3 Gray, 116 196
Goodhue v. Hartford Ins. Co. 184 Mass. 41 356
Goodsell v. Trumbull, 135 Mass. 99 159
Gordon v. Levine, 194 Mass. 418 266
——— v. West End Street Railway, 175 Mass. 181 177, 581
Gorham v. Milford, Attleborough & Woonsocket Street Railway, 189 Mass. 275 421
Gould v. Thompson, 4 Met. 224 549
Grace v. Adams, 100 Mass. 505 386
——— v. Newton Board of Health, 135 Mass. 490 414
Graham v. Badger, 164 Mass. 42 552
——— v. Middleby, 185 Mass. 349 467
Graves v. Washington Ins. Co. 12 Allen, 391 125
Greene v. Lunt, 58 Maine, 518 567
Gregory v. Adams, 14 Gray, 242 246
Greves v. Shaw, 173 Mass. 205 251
Griggs v. Moors, 168 Mass. 354 490
Grinnell v. Western Union Telegraph Co. 113 Mass. 299 123
Guilford v. Adams, 19 Pick. 376 130
Gurney v. Howe, 9 Gray, 404 259
Gustafsen v. Washburn & Moen Manuf. Co. 153 Mass. 468 590

Haberlil v. Boston, 190 Mass. 358 205
Hadley v. Baxendale, 9 Exch. 341 126
Hafey v. Commonwealth, 189 Mass. 540 414
Hale v. Allinson, 188 U. S. 56 453
Hall v. Street Commissioners, 177 Mass. 434 296
—— v. Wakefield, 184 Mass. 147 205
Halloran v. Worcester Consolidated Street Railway, 192 Mass. 104 292
Hamblin v. New York, New Haven, & Hartford Railroad, 195 Mass. 555 302
Hamilton v. Boston & Northern Street Railway, 193 Mass. 324 178
——— v. Taylor, 195 Mass. 68 323
Hammond v. Thompson, 168 Mass. 531 489
Hancock v. Franklin Ins. Co. 107 Mass. 113 379
Hancock National Bank v. Farnum, 176 U. S. 640 455
Handley's estate, 181 Penn. St. 339 251
Hankinson v. Lynn Gas & Electric Co. 175 Mass. 271 323
Hanson v. Davison, 73 Minn. 454 455
Harding v. Harding, 198 U. S. 317 453
Harnois v. Cutting, 174 Mass. 398 339
Harper v. Carroll, 66 Minn. 487 456
Harrington v. Harrington, 107 Mass. 329 42
Harris v. Fitchburg & Leominster Street Railway, 193 Mass. 56 292
Hartford v. New York, New Haven, & Hartford Railroad, 184 Mass. 365 581
Hartford Ins. Co. v. Farrish, 73 Ill. 166 356
Harvard College v. Gore, 5 Pick. 369 98
Harvey v. Connecticut & Passumpsic Rivers Railroad, 124 Mass. 421 127
Harwood v. Lowell, 4 Cush. 310 46
Haskell v. Merrill, 179 Mass. 120 273
Haskins v. Haskins, 9 Gray, 390 50
Hawkins v. Glenn, 131 U. S. 319 455
Hawks v. Northampton, 116 Mass. 420 78
Hayden v. Attleborough, 7 Gray, 338 376
Haynes v. Clinton Printing Co. 169 Mass. 512 193
Haynesworth v. Cox, Harp. Eq. (S. C.) 117 287
Hays v. Western Union Telegraph Co. 70 S. C. 16 125
Hazard v. Day, 14 Allen, 487 331
Heaton-Peninsular Co. v. Eureka Specialty Co. 77 Fed. Rep. 290 62
Hebblethwaite v. Old Colony Street Railway, 192 Mass. 295 378
Hedger v. Rennaker, 8 Met. (Ky.) 255 184
Heiman v. Western Union Telegraph Co. 57 Wis. 562 124
Hennessey v. Taylor, 189 Mass. 583 530
Hess v. Reynolds, 113 U. S. 73 140
Heywood v. Marine Accident Association, 85 Maine, 289 106
Hibernia Savings & Loan Society v. San Francisco, 200 U. S. 310 100
Hickey v. Boston & Lowell Railroad, 14 Allen, 429 90
Higgins v. Boston, 148 Mass. 484 247
Hill v. Goodrich, 32 Conn. 588 27
—— v. Hall, 191 Mass. 253 437
—— v. McKim, 168 Mass. 100 199
—— v. Mowry, 6 Gray, 551 567
—— v. Western Union Telegraph Co. 85 Ga. 425 124
Hillier v. Farrell, 185 Mass. 434 511
Hillyer v. Dickinson, 154 Mass. 502 293
Hinckley v. Kettle River Railroad, 80 Minn. 82 455
Hobart v. Hobart, 45 Iowa, 501 141
Hodgdon v. Cummings, 151 Mass. 293 544
——— v. Haverhill, 193 Mass. 406 188
Hodgkins v. Price, 187 Mass. 13 490
Hoffman v. Manufacturers' Accident Indemnity Co. 56 Mo. App. 301 106
Hofnauer v. R. H. White Co. 186 Mass. 47 373
Hogan v. Roche, 179 Mass. 510 524
Holian v. Boston Elevated Railway, 194 Mass. 74 442

Digitized by Google

Holker v. Poritt, L. R. 8 Ex. 107 571
Holmes v. Hunt, 122 Mass. 505 141
——— v. Turners Falls Co. 150 Mass. 535 141
Holt v. Somerville, 127 Mass. 408 415
Hood v. Hartshorn, 100 Mass. 117 544, 545, 549
Hooper v. Bradford, 178 Mass. 95 250, 288
——— v. Shaw, 176 Mass. 190 235
Horbach v. Miller, 4 Neb. 31 184
Howarth v. Angle, 162 N. Y. 179 454
——— v. Lombard, 175 Mass. 570 453
Howe v. Howe, 179 Mass. 546 250, 288
——— v. West End Street Railway, 167 Mass. 46 203
Howell v. Buffalo, 37 N. Y. 267 297
Howland v. Coffin, 12 Pick. 125 269
——— v. Leach, 11 Pick. 151 18
Hoyt v. Wildfire, 3 Johns. 518 563
Hudson v. Lynn & Boston Railroad, 185 Mass. 510 397
Hughes v. Pritchard, 6 Ch. D. 24 593
Humphrey v. Tatman, 198 U. S. 91 273
Hunneman v. Grafton, 10 Met. 454 583
Hunt v. Hunt, 14 Pick. 374 15
Hunter v. Reiley, 14 Vroom, 480 490
Huntress v. Burbank, 111 Mass. 213 159
Hutcherson v. Durden, 113 Ga. 987 180
Hyde v. Boston & Worcester Street Railway, 194 Mass. 80 204
——— v. Fall River, 189 Mass. 439 6
Hyman v. Jockey Club Wine, Liquor & Cigar Co. 9 Col. App. 299 489

Illinois Midland Railway v. People, 84 Ill. 426 197
International Text Book Co. v. Weissinger, 160 Ind. 349 390
Irvine v. Watson, 5 Q. B. D. 414 380

Jackman v. Arlington Mills, 137 Mass. 277 573
James v. Interstate Consolidated Street Railway, 193 Mass. 264 292
Janvrin v. Poole, 181 Mass. 463 414
Jaquith v. Davenport, 191 Mass. 415 398
——— v. Fuller, 167 Mass. 123 199
Jassy, The, 75 L. J. P. D. & A. 93 353
Jenkins v. Andover, 103 Mass. 94 471
Jennings v. Demmon, 194 Mass. 108 217
——— v. Rooney, 183 Mass. 577 7
Jenny Lind Co. v. Bowyer & Co. 11 Cal. 194 52
Johnson v. Brown, 4 Cranch C. C. 235 192
——— v. Willis, 7 Gray, 164 265
Jones v. Boston, 104 Mass. 461 414
——— v. Collins, 177 Mass. 444 69
——— v. ———, 188 Mass. 58 69
——— v. Van Kirk, 2 Fisher's Pat. Cas. 586 62
Joseph Dry Goods Co. v. Hecht, 120 Fed. 760 140

Keefe v. Boston & Albany Railroad, 142 Mass. 251 90, 491
Keenan v. Knight, 9 Allen, 257 128
Keith v. Easton, 2 Allen, 552 205
——— v. Worcester & Blackstone Valley Street Railway, 196 Mass. 478 318
Keller v. Webb, 125 Mass. 88 59
Kelley v. New York, New Haven, & Hartford Railroad, 168 Mass. 308 476
——— v. Ohio River Railroad, 58 W. Va. 216 517
Kellogg, In re, 121 Fed. Rep. 333 85
——— v. Waite, 12 Allen, 529 100
Kelly v. Blackstone, 147 Mass. 448 314
Kennedy v. Commonwealth, 182 Mass. 480 139, 360
——— v. Doyle, 10 Allen, 161 259
Kenyon v. Eastwood, 57 L. J. (N. S.) Q. B. D. 455 141
Kidder v. Dunstable, 11 Gray, 342 248, 484
Kiernan v. Linnehan, 151 Mass. 543 549
Killam v. Peirce, 153 Mass. 502 403
Kimball v. Cross, 136 Mass. 300 268
King v. Johnson, 7 Gray, 239 543
——— v. Tirrell, 2 Gray, 331 181
Kingsbury v. Chapin, 196 Mass. 533 250
Kinney v. Robison, 49 Mich. 247 204
Kirkpatrick v. Pope Manuf. Co. 64 Fed. Rep. 869 62
Knerr v. Bradley, 105 Penn. St. 190 543
Knight v. New England Worsted Co. 2 Cush. 271 59
Knoxville Iron Co. v. Harbison, 188 U. S. 13 390
Korn v. Browne, 64 Penn. St. 55 184
Kramer v. Carter, 136 Mass. 504 230
——— v. Cook, 7 Gray, 550 268
Kupiec v. Warren, Brookfield & Spencer Street Railway, 196 Mass. 468 309
Kyle v. Kavanagh, 103 Mass. 356 15

Laing v. Barbour, 119 Mass. 523 593, 595
Lake County v. Sulphur Bank Quicksilver Mining Co. 66 Cal. 17 567
Lamb v. Pierce, 113 Mass. 72 269
——— v. Powder River Live Stock Co. 132 Fed. Rep. 434 185
Lansky v. West End Street Railway, 178 Mass. 20 52
Larned v. Clarke, 8 Cush. 29 549
Lash v. Ames, 171 Mass. 487 331
Lawrence v. Fairhaven, 5 Gray, 110 573
——— v. Nahant, 136 Mass. 477 414
——— v. New Bedford, 160 Mass. 227 79
——— v. Stratton, 6 Cush. 163 269
Leadbeater v. Roth, 25 Ill. 587 489
Leary v. Boston Elevated Railway, 180 Mass. 203 79
Leddy v. Barney, 139 Mass. 394 385

Digitized by Google

Lee v. Tarplin, 183 Mass. 52 466
Lemoine v. Aldrich, 177 Mass. 89 411
Lennox v. Interurban Street Railway, 104 App. Div. (N. Y.) 110 517
Leonard v. Travis, 6 Allen, 129 265
Lewis v. Jewell, 151 Mass. 345 466
Libby v. Chase, 117 Mass. 105 117
Life & Fire Ins. Co. of New York v. Wilson, 8 Pet. 291 519
Linnehan v. Sampson, 126 Mass. 506 336
Lippincott v. Lasher, 17 Stew. (N. J.) 120 204
Little v. Newton, 2 M. & G. 351 544
Lockhart v. Yeiser, 2 Bush, 231 184
Logan v. New Bedford, 157 Mass. 535 376
Loker v. Brookline, 13 Pick. 343 484
Lombard v. Morse, 155 Mass. 136 117
London & Northwest Mortgage Co. v. St. Paul Park Improvement Co. 84 Minn. 144 454
Lorain Steel Co. v. Norfolk & Bristol Street Railway, 187 Mass. 500 206
Lord v. Parker, 8 Allen, 127 508
Loring v. Alline, 9 Cush. 68 181
Louisville & Nashville Railroad v. East St. Louis, 134 Ill. 656 567
Lovell v. DeBardelaben Coal & Iron Co. 90 Ala. 13 46
Low v. Elwell, 121 Mass. 309 331
Lowd v. Brigham, 154 Mass. 107 379
Luckumsey Rowji v. Hurbun Nursey, Ind. L. R. 5 Bomb. 580 192
Lukens, In re, 138 Fed. Rep. 188 273
Lycoming Ins. Co. v. Updegraff, 40 Penn. St. 311 356
Lyon v. Cunningham, 136 Mass. 532 543, 549
Lynch v. M. T. Stevens Co. 187 Mass. 397 395

McCaffrey v. Smith, 41 Hun, 117 204
McClaine v. Rankin, 197 U. S. 154 453
McConnell v. Kelley, 138 Mass. 372 93
McCowan v. Donaldson, 128 Mass. 169 117
McCoy v. Jordan, 184 Mass. 575 528
McDermott v. Severe, 202 U. S. 600 517
——— v. Warren, Brookfield & Spencer, 172 Mass. 197 204
McDonald v. Dutton, 190 Mass. 391 584
——— v. Snelling, 14 Allen, 290 539
McDonough v. Boston Elevated Railway, 191 Mass. 509 412
McElroy v. John Hancock Ins. Co. 88 Md. 137 106
McGahey v. Virginia, 135 U. S. 662 184
McGarrahan v. New York, New Haven, & Hartford Railroad, 171 Mass. 211 515
McGee v. Boston Elevated Railway, 187 Mass. 569 389
McGrath v. Reynolds, 116 Mass. 566 87
McGreevy v. McGrath, 152 Mass. 24 275
McKay v. Smith, 39 Fed. Rep. 556 62
McKean v. Salem, 148 Mass. 109 503
McKusick v. Seymour, Sabin & Co. 48 Minn. 158 453
McLeod v. Jones, 105 Mass. 403 364
——— v. Shelly Manuf. & Improvement Co. 106 Ala. 81 53
McMahon v. McHale, 174 Mass. 320 552
McNicholas v. New England Tel. & Tel. Co. 196 Mass. 138 412
——— v. Prudential Ins. Co. 191 Mass. 304 386
McPhee v. New England Structural Co. 188 Mass. 141 411
Mack v. Dailey, 67 Vt. 90 543
Macomber v. Taunton, 100 Mass. 255 247
Madden v. Boston Elevated Railway, 194 Mass. 491 442
Magor v. Chadwick, 11 A. & E. 571 571
Maguire v. Fitchburg Railroad, 146 Mass. 379 422
Maloy v. Holl, 190 Mass. 277 297
Mandell v. Fidelity & Casualty Co. 170 Mass. 173 106
Manley v. Boston & Maine Railroad, 159 Mass. 493 302
Marble v. Worcester, 4 Gray, 395 539
Marshall v. Ipswich, 110 Mass. 522 247
——— v. Sherman, 148 N. Y. 9 453
Marston v. Swett, 82 N. Y. 526 62
Martin v. Harding, [1907] 1 Ch. 465 593
——— v. Press Publishing Co. 98 App. Div. (N. Y.) 531 193
Mason v. Winthrop, 196 Mass. 18 468
Masonic Building Association v. Brownell, 164 Mass. 306 414
Massachusetts Ins. Co. v. Green, 185 Mass. 306 192
Mawhinney v. Southern Ins. Co. 98 Cal. 184 356
Maxon v. Delaware, Lackawanna & Western Railroad, 112 N. Y. 559 180
Maynard v. Oregon Railroad, 46 Ore. 15 517
Meadowcroft v. New York, New Haven, & Hartford Railroad, 193 Mass. 249 422
Meehan v. Holyoke Street Railway, 186 Mass. 511 480
Melcher v. Boston, 9 Met. 73 100
Menage v. Rosenthal, 175 Mass. 358 59
Mercantile Guaranty Co. v. Hilton, 191 Mass. 141 323
Merced County v. Helm, 102 Cal. 159 111
Merchants' National Bank v. Braithwaite, 7 N. D. 358 184
——— v. Citizens' Gas Light Co. 159 Mass. 505 603
——— v. Haverhill Iron Works, 159 Mass. 158 323
——— v. Minnesota Thresher Manuf. Co. 90 Minn. 144 452
Merriam v. Currier, 191 Mass. 133 475

Digitized by Google

Merriam v. Willis, 10 Allen, 118 364
Merrick v. Amherst, 12 Allen, 500 471
Merritt v. Morse, 108 Mass. 270 280
——— v. State, 19 Tex. App. 435 109
Methuen & Blore's Contract, In re, 16 Ch. D. 696 593
Milford v. Commonwealth, 144 Mass. 64 138
Miller v. New York, New Haven, & Hartford Railroad, 175 Mass. 368 553
——— v. Tobin, 18 Fed. Rep. 609 140
Millett v. Mullen, 95 Maine, 400 567
Milligan v. Lalance & Grosjean Manuf. Co. 21 Fed. Rep. 570 62
Minneapolis Base Ball Co. v. City Bank, 66 Minn. 441 453
Minnesota Thresher Manuf. Co. v. Langdon, 44 Minn. 37 454
Minot v. Attorney General, 189 Mass. 176 236
——— v. Baker, 147 Mass. 348 236
Monmouth v. Gardiner, 35 Maine, 247 573
Moody v. Shaw, 178 Mass. 375 251
Moore v. Ewing, Coxe, (N. J.) 144 544
——— v. Wildey Casualty Co. 176 Mass. 418 106, 125
Moran v. Prather, 23 Wall. 492 59
Morasse v. Brochu, 151 Mass. 567 193
Morse v. Toppan, 3 Gray, 411 508
Moseley v. Washburn, 167 Mass. 345 503
Mosheim v. Pawn, 18 N. Y. Supp. 166 41
Mowry v. Smith, 9 Allen, 67 526
Moynihan v. Holyoke, 193 Mass. 26 468
Mulvey v. Boston, 197 Mass. 178 282
Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28 138
Murphy v. American Rubber Co. 159 Mass. 266 241
Murray v. Marshall, 94 N. Y. 611 841
Mutter v. Lawrence Manuf. Co. 195 Mass. 517 411
Myers v. Wheelock, 60 Kans. 747 185

Nary v. Merrill, 8 Allen, 451 403
Nash v. Commonwealth, 174 Mass. 335 139, 360
——— v. South Hadley, 145 Mass. 105 589
Natick Gas Light Co. v. Natick, 175 Mass. 246 204
National & Providence Worsted Mills v. Frankfort Ins. Co. 28 R. I. 126 172
National Bank of Commerce v. New Bedford, 175 Mass. 257 129
National Contracting Co. v. Commonwealth, 183 Mass. 89 139
National Rubber Co. v. Boston Rubber Shoe Co. 41 Fed. Rep. 48 62
Nestor v. Fall River, 183 Mass. 265 46
New v. Southern Railway, 116 Ga. 147 180
Newcomb v. Boston Protective Department, 146 Mass. 596 248, 337, 366
Newell's Appeal, 100 Penn. St. 513 543
New England Telephone & Telegraph Co. v. Boston Terminal Co. 182 Mass. 397 203
Newhall v. Ireson, 8 Cush. 595 574
New Haven Horse Nail Co. v. Linden Spring Co. 142 Mass. 349 452
New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650 557
Newton, petitioner, 172 Mass. 5 142
——— v. Worcester, 174 Mass. 181 483
Nimrod, The, 1 Ware, 9 564
Nolin v. Pearson, 191 Mass. 283 476, 508
Nourse v. Nourse, 116 Mass. 101 510
Nuttall v. Bracewell, L. R. 2 Ex. 1 571

Oakman v. Boyce, 100 Mass. 477 503
Odd Fellows Fraternal Accident Association v. Earl, 70 Fed. Rep. 16 106
Offerman, Matter of, 25 App. Div. (N. Y.) 94 250
O'Gara v. Neylon, 161 Mass. 140 181
Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co. 183 Mass. 557 455
O'Leary v. Haverhill & Plaistow Street Railway, 193 Mass. 339 292, 422
Olivieri v. Atkinson, 168 Mass. 28 93
Olson v. Cook, 57 Minn. 552 453
O'Neil v. Armstrong, [1895] 2 Q. B. 70 563
——— v. Sinclair, 153 Ill. 525 111
Opinion of the Justices, 163 Mass. 589 390
Osborn v. United States Bank, 9 Wheat. 738 350
Osborne v. Lindstrom, 9 N. D. 1 184
Oulighan v. Butler, 189 Mass. 287 580

Packard v. Old Colony Railroad, 168 Mass. 92 15
Palmer v. Bank of Zumbrota, 72 Minn. 266 456
——— v. Coyle, 187 Mass. 136 323
Parker v. American Woolen Co. 195 Mass. 591 574
——— v. Dudley, 118 Mass. 602 525
——— v. Huntington, 2 Gray, 124 465
——— v. Parker, 1 Gray, 409 831
Parlement Belge, The, L. R. 5 P. D. 197 352
Partelow v. Newton & Boston Street Railway, 196 Mass. 24 503
Patten v. Deshon, 1 Gray, 325 269
Patton v. Employers' Liability Assurance Corp. 20 L. R. (Ir.) 93 106
Paul v. Fidelity & Casualty Co. 186 Mass. 413 106
Peabody v. Hamilton, 106 Mass. 217 26
Pearson v. Bailey, 180 Mass. 229 341
Peaslee v. Peaslee, 147 Mass. 171 886
Peck v. Clark, 142 Mass. 436 574

Digitized by Google

Peirson v. Boston Elevated Railway, 191 Mass. 223 255
Pells v. Webquish, 129 Mass. 469 259
People v. Dashaway Association, 84 Cal. 114 197
——— v. Geneva College, 5 Wend. 211 197
——— v. McConnell, 155 Ill. 192 519
——— v. North Chicago Railway, 88 Ill. 537 196
——— v. Rome, Watertown & Ogdensburg Railroad, 103 N. Y. 95 560
——— v. Utica Ins. Co. 15 Johns. 358 197
Perry v. Hull, 180 Mass. 547 199
Phillips v. County Commissioners, 122 Mass. 258 414
——— v. United States Benevolent Society, 120 Mich. 142 106
Phippin v. Stickney, 3 Met. 384 544
Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425 87
——— v. Drew, 136 Mass. 75 208
——— v. Smith, 13 Allen, 42 276
Pike v. Fay, 101 Mass. 134 466
Pinney v. Hall, 156 Mass. 225 373
Pitman v. Stevens, 15 East, 505 593
Pitts v. Milton, 192 Mass. 88 287
Pomroy v. Stevens, 11 Met. 244 269
Pope Manuf. Co. v. Owsley, 27 Fed. Rep. 100 62
Portland Natural Gas & Oil Co. v. State, 135 Ind. 54 560
Power v. Kitching, 10 N. D. 254 185
Powers v. Boston, 154 Mass. 60 314
Pratt v. Buckley, 175 Mass. 115 341
—— v. Farrar, 10 Allen, 519 330
—— v. Prouty, 153 Mass. 333 521
Prescott v. Prescott, 7 Met. 141 275
Primrose v. Western Union Telegraph Co. 154 U. S. 1 123
Prince v. Boston, 111 Mass. 226 415
Provident Life & Trust Co. v. Mills, 91 Fed. Rep. 435 147
Pulsifer v. Greene, 96 Maine, 488 453
Purdon v. Blinn, 192 Mass. 387 281
Putnam v. Misochi, 189 Mass. 421 455

Queen, The v. McLeod, 8 Canada Supreme Court, [1883] 23 351
Quinn v. Boston Elevated Railway, 188 Mass. 473 421

Rathbone v. Rathbone, 5 Pick. 221 180
Ratigan v. Judge, 181 Mass. 572 524
Raymond v. Commonwealth, 193 Mass. 486 224
——— v. New York, New Haven, & Hartford Railroad, 182 Mass. 337 302
——— v. Worcester, 172 Mass. 205 323
Rea v. Rea, 63 Mich. 257 439
Reading v. Althouse, 98 Penn. St. 400 571
Redpath v. Western Union Telegraph Co. 112 Mass. 71 125
Reed v. Insurance Co. 95 U. S. 23 59
Reed v. Staton, 3 Hayw. (Tenn.) 159 52
Regan v. Lombard, 192 Mass. 319 480
Revere Water Co. v. Winthrop, 192 Mass. 455 533
Reynolds Elevator Co. v. Merchants National Bank, 55 App. Div. (N. Y.) 1 604
Rice v. Sanders, 152 Mass. 108 341
Richards v. Enfield, 13 Gray, 344 247
Richardson v. Boston, 156 Mass. 145 376
——— v. Danvers, 176 Mass. 413 244
——— v. Stodder, 100 Mass. 528 15
Richmond v. Ames, 164 Mass. 467 231
Riddell v. Thayer, 127 Mass. 487 439
Righter v. Newark, 16 Vroom, 104 297
Robbins v. Brockton Street Railway, 180 Mass. 51 379
Roberts v. New York, New Haven, & Hartford Railroad, 175 Mass. 296 301
Robinson v. Trofitter, 106 Mass. 51 159
Rogers v. Betterton, 93 Tenn. 630 604
——— v. Nichols, 186 Mass. 440 454
Roppe v. Barker, 4 Pick. 239 364
Rorick v. Railroad Officials' & Employees' Accident Association, 55 C. C. A. 369 106
——— v. ———, 119 Fed. Rep. 63 106
Rosenberg v. Doe, 146 Mass. 191 385, 564
Rouse v. Somerville, 190 Mass. 361 78
Russell v. Western Union Telegraph Co. 57 Kans. 230 124
Rust v. Essex, 182 Mass. 313 246, 313
Ryalls v. Mechanics Mills, 150 Mass. 190 305

Safford v. Knight, 117 Mass. 281 379
St. Louis Car Co. v. Stillwater Street Railway, 53 Minn. 129 454
St. Paul's Church v. Attorney General, 164 Mass. 188 236
San Antonio Street Railway v. State, 90 Texas, 520 561
Sanborn v. Sanborn, 7 Gray, 142 331
Sanders v. Partridge, 108 Mass. 556 269
Sanford v. Hampden Paint & Chemical Co. 179 Mass. 10 182
Saranac Land & Timber Co. v. New York, 177 U. S. 318 182
Savage v. Marlborough Street Railway, 186 Mass. 203 371
Sawyer v. Commonwealth, 182 Mass. 245 142
——— v. Cook, 188 Mass. 168 15
——— v. Metropolitan Water Board, 178 Mass. 267 142
Saxe v. Walworth Manuf. Co. 191 Mass. 388 339
Scanlan v. Boston, 140 Mass. 84 78
Scannal v. Cambridge, 163 Mass. 91 376
Schleicher's estate, 201 Penn. St. 612 235
Schooner Exchange v. M'Faddon, 7 Cranch, 116 352
Scollard v. Brooks, 170 Mass. 445 87

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Searle v. Dwelling House Ins. Co. 152 Mass. 263 125
Sears v. Crocker, 184 Mass. 586 204
Security Live Stock Ins. Association v. Briggs, 22 Ill. App. 107 544
Selectmen of Gardner v. Templeton Street Railway, 184 Mass. 294 199
Shailer v. Bumpstead, 99 Mass. 112 525
Sharon v. Smith, 180 Mass. 539 205
Shelby v. Sun Printing & Publishing Association, 109 N. Y. 611 190
——— v. ———, 38 Hun, 474 190
Shepard v. Milwaukee Gas Light Co. 6 Wis. 539 558
Shepherd v. May, 115 U. S. 505 342
Sheppard v. Sheppard, 5 Halst. 250 52
Sherman v. Fall River Iron Works, 5 Allen, 213 573
Shultz v. Old Colony Street Railway, 193 Mass. 309 540
Shumway v. Fowler, 4 Johns. 425 52
Sibley v. Phelps, 6 Cush. 172 348
Skally v. Shute, 182 Mass. 367 489
Skinner, Matter of, 106 App. Div. (N. Y.) 217 251
Smith v. Anderson, 15 Ch. D. 247 111
——— v. Boston & Maine Railroad, 120 Mass. 490 248
——— v. Cushing, 18 Wis. 295 52
——— v. McEnany, 170 Mass. 26 490
——— v. Morrison, 22 Pick. 430 181
——— v. Packard, 12 Wis. 371 185
——— v. Richards, 155 Mass. 79 230
——— v. Shepard, 15 Pick. 147 489
——— v. Sherman, 4 Cush. 408 476
——— v. Treat, 2 Ware, 270 564
Snow v. New York, New Haven, & Hartford Railroad, 185 Mass. 321 515
Soebel v. Boston Elevated Railway, 197 Mass. 46 379
Sohn v. Watterson, 17 Wall. 596 182
Soper v. Lawrence, 201 U. S. 359 182
Sorensen v. Balaran, 11 App. Div. (N. Y.) 164 192
——— v. Lowell, 23 Pick. 71 204
South Chicago Railway v. Calumet Street Railway, 171 Ill. 391 558
Spaulding v. Knight, 116 Mass. 148 466
——— v. Lowell, 23 Pick. 71 204
Spelman v. Aldrich, 126 Mass. 113 100
Spencer v. Spencer, 181 Mass. 471 473
——— v. ———, 95 N. Y. 353 341
Spinney v. Boston Elevated Railway, 188 Mass. 30 379
Spofford v. Harlow, 3 Allen, 176 248
Spring v. Williamstown, 186 Mass. 479 240
Springfield v. Sleeper, 115 Mass. 587 69
——— v. Springfield Street Railway, 182 Mass. 41 79
Sproull v. Pratt & Whitney Co. 97 Fed. Rep. 807 62
Spurr v. Cass, L. R. 5 Q. B. 656 380
Squire v. Tellier, 185 Mass. 18 390
——— v. Western Union Telegraph Co. 98 Mass. 232 126
Stackpole v. Boston, 193 Mass. 562 442
Stacy v. Vermont Central Railroad, 32 Vt. 551 543
Stanton v. Springfield, 12 Allen, 566 482
State v. Cornell, 54 Neb. 647 180
——— v. Hartford & New Haven Railroad, 29 Conn. 538 558
——— v. Minnesota Thresher Manuf. Co. 40 Minn. 213 197, 452
——— v. Norwalk & Danbury Turnpike Co. 10 Conn. 157 197
——— v. Portland Natural Gas & Oil Co. 153 Ind. 488 197
——— v. Standard Oil Co. 49 Ohio St. 137 197
Steele v. Burkhardt, 104 Mass. 59 248
Stein v. Valkenhuysen, E., B. & E. 65 27
Stephens v. Wilkins, 6 Penn. St. 260 27
Stevens v. Boston Elevated Railway, 184 Mass. 476 324
——— v. Wood, 127 Mass. 123 265
Stewart v. Father Mathew Society, 41 Mich. 67 197
Stine v. Bennett, 18 Minn. 158 184
Stockwell v. Fitchburg, 110 Mass. 305 247
Stone v. Attleborough, 140 Mass. 328 247
——— v. Forbes, 189 Mass. 168 224
——— v. St. Louis Stamping Co. 155 Mass. 267 268
——— v. Stone, 191 Mass. 371 524
Stoops v. Smith, 100 Mass. 63 59
Straw & Ellsworth Co. v. Kilbourne Co. 80 Minn. 125 454
Strong, Matter of, 17 N. J. Law J. 284 251
——— v. Sun Ins. Co. 31 N. Y. 103 180
Stubbs v. Boston & Northern Street Railway, 193 Mass. 513 292
Subbaiyar v. Kristnaiyar, Ind. L. R. 1 Madr. 383 191
Suesemilch v. Suesemilch, 43 Ill. App. 573 141
Sullivan v. Boston Elevated Railway, 185 Mass. 602 515
——— v. Fugazzi, 193 Mass. 518 7
Sutcliffe v. Booth, 32 L. J. Q. B. 136 571
Suter v. Hilliard, 132 Mass. 412 235
Sutton, Matter of, 8 App. Div. (N. Y.) 208 251
———, 149 N. Y. 618 251
——— v. Goodman, 194 Mass. 389 489
Swain v. Security Live Stock Ins. Co. 165 Mass. 321 106
Swan v. Drury, 22 Pick. 485 18
Sweet v. Kimball, 166 Mass. 332 27
Swett v. Shumway, 102 Mass. 365 59
——— v. Southworth, 125 Mass. 417 267
Swift, In re, 137 N. Y. 77 251
Swift River Co. v. Fitchburg Railroad, 169 Mass. 326 126
Symmes v. Drew, 21 Pick. 278 158

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Taber *v.* Nye, 12 Pick. 105 563
Taintor *v.* Mayor & City Council of Cambridge, 192 Mass. 522 413
Tapley *v.* Goodsell, 122 Mass. 176 159
Taylor *v.* Woburn, 130 Mass. 494 588
Teele *v.* Bishop of Derry, 168 Mass. 341 237
Tellefsen *v.* Fee, 168 Mass. 188 27
Temple *v.* Phelps, 193 Mass. 297 248
Terry *v.* Anderson, 95 U. S. 628 182
Texas Mexican Railway *v.* Douglass, 69 Texas, 694 517
Thayer *v.* New England Lithographic Steam Printing Co. 108 Mass. 523 455
Thomas *v.* Railroad Co. 101 U. S. 71 558
Thompson *v.* Fairbanks, 196 U. S. 516 271
——— *v.* The Sam Brown, 45 Fed. Rep. 508 565
Tighe *v.* Lowell, 119 Mass. 472 247
Tinker *v.* New York, Ontario & Western Railroad, 157 N. Y. 312 204
Tinkham *v.* Sawyer, 153 Mass. 485 241
Tobey *v.* Taunton, 119 Mass. 404 230
Todd *v.* Lunt, 148 Mass. 322 567
Toland *v.* Paine Furniture Co. 179 Mass. 501 379
Tompkins *v.* Hill, 145 Mass. 379 564
Torphy *v.* Fall River, 188 Mass. 310 314, 467, 590
Toupin *v.* Peabody, 162 Mass. 473 268
Travelers' Ins. Co. *v.* Nax, 142 Fed. Rep. 658 106
Travers *v.* Dorr, 60 Minn. 173 341
Trippe *v.* Provident Fund Society, 140 N. Y. 23 106
Troy & Greenfield Railroad *v.* Commonwealth, 127 Mass. 43 138
Tucker *v.* Crowley, 127 Mass. 400 342
Turner *v.* New York, 177 U. S. 318 182
Tully *v.* Tully, 159 Mass. 91 100
Tuttle *v.* Tuttle, 12 Met. 551 564
Twombly *v.* Monroe, 136 Mass. 464 192, 323, 439

Underwood *v.* Boston Five Cents Savings Bank, 141 Mass. 305 16
Union Pacific Railroad *v.* Periston, 18 Wall. 5 100
Union Trust Co., In re, 122 Fed. Rep. 937 85
United States *v.* Patterson, 150 U. S. 65 140
United States Casualty Co. *v.* Hanson, 20 Colo. App. 393 106
United States Telegraph Co. *v.* Gildersleve, 29 Md. 232 127

Van Cleaf *v.* Burns, 118 N. Y. 549 489
Van Deusen *v.* Blum, 18 Pick. 229 478
Van Norman *v.* Gordon, 172 Mass. 576 453
Vavasseur *v.* Krupp, 9 Ch. D. 351 353
Viles *v.* Waltham, 157 Mass. 542 93
Villers *v.* Monsley, 2 Wils. 403 191

Wade *v.* Dowling, 4 El. & Bl. 44 544
Wadsworth *v* Boston Elevated Railway, 182 Mass. 572 339
——— *v.* Queen of Spain, 17 Q. B. 171 352
Walker *v.* Lancashire Ins. Co. 188 Mass. 560 124
Wamesit Power Co. *v.* Lowell & Andover Railroad, 180 Mass. 455 519
Wanzer *v.* Bright, 52 Ill. 35 27
Ward *v.* Merriam, 193 Mass. 135 159
Warren *v.* Fitchburg Railroad, 8 Allen, 227 90
——— *v.* Nichols, 6 Met. 261 165
——— *v.* Spencer Water Co. 143 Mass. 155 10
——— *v.* Street Commissioners, 131 Mass. 6 295
——— *v.* ———, 187 Mass. 290 296
Washburn *v.* Easton, 172 Mass. 525 205
Wasserman *v.* McDonnell, 190 Mass. 326 38
Waterloo Organ Co., In re, 118 Fed. Rep. 904 85
Watson *v.* Coast, 35 W. Va. 463 543
Watteau *v.* Fenwick, [1893] 1 Q. B. 346 380
Weatherby *v.* Meiklejohn, 56 Wis. 73 571
Webb *v.* Dixon, 9 East, 15 287
Webster *v.* Fitchburg Railroad, 161 Mass. 298 90
Weeks *v.* Boston Elevated Railway, 190 Mass. 563 177
——— *v.* Currier, 172 Mass. 58 466
Wellman *v.* Sun Printing & Publishing Co. 66 Hun, 331 192
Wells *v.* Day, 124 Mass. 38 18
Wesson *v.* Commonwealth, 144 Mass. 60 138
——— *v.* Washburn Iron Co. 13 Allen, 95 573
Western Union Telegraph Co. *v.* Coggin, 68 Fed. Rep. 137 127
——— *v.* Cooper, 71 Texas, 507 517
——— *v.* Dougherty, 54 Ark. 221 124
——— *v.* Hall, 124 U. S. 444 126
——— *v.* Stratemeier, 6 Ind. App. 125 125
Westgate *v.* Wixon, 128 Mass. 304 543
Weston *v.* Boston & Maine Railroad, 190 Mass. 298 126
——— *v.* Foster, 7 Met. 297 382
Whalen *v.* Equitable Accident Co. 99 Maine, 231 106
Whall *v.* Converse, 146 Mass. 345 73
Wheeler *v.* Jackson, 137 U. S. 245 185
——— *v.* Millar, 90 N. Y. 353 456
——— *v.* Worcester, 10 Allen, 591 573
Wheelock *v.* Barney, 27 Ind. 462 41
White *v.* Blanchard Bros. Granite Co. 178 Mass. 363 208
——— *v.* Chapin, 12 Allen, 516 574

Digitized by Google

White v. Foster, 102 Mass. 375 269
——— v. Lee, 14 Fed. Rep. 789 62
——— v. Maynard, 111 Mass. 250 566
——— v. Quincy, 97 Mass. 480 78
——— v. Schloerb, 178 U. S. 542 85
——— v. Wallen, 17 Ga. 106 52
Whiting v. Mayor & Aldermen of Boston, 106 Mass. 89 415
——— v. ———, 172 Mass. 240 466
Whitman v. Oxford National Bank, 176 U. S. 559 453
Whitney v. Esson, 99 Mass. 308 267
Wightman v. Devere, 33 Wis. 570 180
Wilbraham v. Ludlow, 99 Mass. 587 93
Wilbur v. Gilmore, 21 Pick. 250 475
Wilka, In re, 12 Am. B. R. 727 85
Wilkins v. Wainwright, 173 Mass. 212 476
Wilkinson v. Lindgren, L. R. 5 Ch. 570 235
Willard v. Clarke, 7 Met. 435 181
William Jarvis, The, 1 Sprague, 485 563
Williams v. Citizens Electric Street Railway, 184 Mass. 437 515
——— v. Mutual Gas Co. 52 Mich. 499 558
——— v. Old Colony Street Railway, 193 Mass. 305 204
——— v. Williams, 20 Col. 51 180
Williamson v. Old Colony Street Railway, 191 Mass. 144 292
Willis v. Mabon, 48 Minn. 140 453
Wilson v. Boston, 117 Mass. 509 78
——— v. Charlestown, 8 Allen, 137 313
——— v. Iseminger, 185 U. S. 55 182
——— v. Mulloney, 185 Mass. 430 22
Windham Provident Institution v. Sprague, 43 Vt. 502 453
Windus v. Windus, 6 DeG., M. & G. 549 593
Winslow v. Hathaway, 1 Pick. 210 27
Witherlee v. Ocean Ins. Co. 24 Pick. 67 69
Wolf v. Western Union Telegraph Co. 62 Penn. St. 83 124
Wood v. Robbins, 11 Mass. 504 604
——— v. Wood, 78 Ky. 624 27
Woodall v. Boston Elevated Railway, 192 Mass. 308 333
Woodward Iron Co. v. Cook, 124 Ala. 349 46
Woolley v. Whitby, 2 B. & C. 580 141
Worcester v. Lakeside Manuf. Co. 174 Mass. 299 140
——— v. Worcester Consolidated Street Railway, 182 Mass. 49 79
Worland, In re, 92 Fed. Rep. 893 85
Worthington v. Plymouth County Railroad, 168 Mass. 474 473
——— v. Waring, 157 Mass. 421 139
Wreford v. Kendrick, 107 Mich. 389 489
Wright v. Oakley, 5 Met. 400 181
Wrightman v. Boone County, 82 Fed. Rep. 412 184

Yale v. Comstock, 112 Mass. 267 165
Ydun, The, [1899] P. D. 236 184
Young v. The Scotia, [1903] A. C. 501 353
——— v. Western Union Telegraph Co. 65 N. Y. 163 123

Zerrahn v. Ditson, 117 Mass. 553 473

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

EDWARD R. PRICE *vs.* ARTHUR T. PARKER & others.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Contract, Construction, Validity. *Partnership. Deceit. Words*, "Liable," "Liabilities," "Fall due."

An agreement in writing by one of two partners, upon the dissolution of their partnership to take over the business of the firm and "take up, pay and discharge all the debts and liabilities of the said copartnership as the same shall fall due," includes an obligation to discharge the liability of the members of the partnership upon a judgment obtained in an action brought against them after dissolution for damages caused by alleged false representations made by the firm in the sale of certain securities.

There is nothing invalid or contrary to public policy in an agreement of a continuing partner of a firm upon a dissolution of the partnership to indemnify his retiring partner against liabilities which include or may include a liability for damages for alleged false representations made by the firm in the sale of certain securities.

CONTRACT against the principal and sureties on a bond dated June 19, 1893, to ensure the performance of the covenants contained in an agreement of the same date providing for the dissolution of the partnership theretofore existing between the plaintiff and the principal defendant and the purchase and taking

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over of the business of the firm by that defendant. Writ dated March 29, 1900.

In the Superior Court the case was tried before *Brown*, J., without a jury. The material condition of the bond and the material covenant of the contract of dissolution are quoted in the opinion, where also the material facts are stated.

The defendants asked the judge to make the following rulings:

1. "This being an action to compel the defendant, who the plaintiff alleges was his partner, to pay the plaintiff the amount of a judgment recovered by one A. H. Whiting against both the plaintiff and the principal defendant for false representations in the sale of a bond (*Whiting* v. *Price et al.*, 169 Mass. 576 and 172 Mass. 240) the plaintiff cannot recover because such a claim is not a legal debt or liability, and the parties if both are guilty of the false representations were *in pari delicto*."

2. "The bond on which the plaintiff relies binds the defendant 'to pay all the debts and liabilities of said firm as the same shall fall due.' The judgment of Whiting against Price and Parker for false representations in the sale of a bond is not such a debt or liability as called for in the bond in question. Under the bond Parker is only liable for the legal debts and liabilities incurred in the usual course of the business of the firm."

3. "The case of *Whiting* v. *Price et al.* being for false representations, a judgment of itself shows a joint wrong, and Price being the party mulcted cannot demand payment, as both are equally in the wrong. Price must be presumed to have known that the representations were unlawful, and consequently this case comes within the cases of *Jacobs* v. *Pollard*, 10 Cush. 287, and *Atkins* v. *Johnson*, 43 Vt. 78."

The judge refused to make any of these rulings, and found for the plaintiff in the sum of $1,788.96. The defendants alleged exceptions.

G. A. Perkins, for the defendants.

T. Parker, for the plaintiff.

MORTON, J. The plaintiff and the defendant Arthur T. Parker, whom we shall speak of as the defendant, were formerly copartners engaged in the brokerage and insurance business. In June, 1893, the firm was dissolved by an agreement in writing under seal. The business was taken over by Parker and one of

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the provisions of the agreement of dissolution was that he should "take up, pay and discharge all the debts and liabilities of the said copartnership as the same shall fall due." The bond in suit was given to ensure the performance of this and other covenants contained in the agreement. One of the recitals in the bond is, "whereas the said A. T. Parker also agrees to assume and pay all the debts and liabilities of the said copartnership, as the same shall fall due"; and this is followed by the condition, amongst others, that "if the said A. T. Parker . . . shall . . . also assume and pay all the debts and liabilities of said A. T. Parker & Co. then this obligation shall be void, otherwise it shall be and remain in full force and virtue." After the dissolution of the firm one Whiting brought an action against the former copartners to recover damages caused by alleged false representations made to him in the sale by the firm of certain securities. Whiting recovered judgment, and the plaintiff, in order to prevent his property from being levied on, paid the amount due on the execution. This is an action to recover the amount so paid.

The defendant contends that the amount paid by the plaintiff did not constitute a debt or liability within the meaning of those words as used in the bond and agreement of dissolution. It is not necessary to consider whether Whiting's claim constituted a debt before it was reduced to judgment, or whether after it was reduced to judgment it came within the scope of the obligations assumed by the defendant as a debt. It is clear, we think, that it was at all events a liability and as such came within the terms of the bond and agreement. The words "liable" and "liability" are terms of large significance and in the absence of anything limiting their scope include obligations arising out of torts as well as out of contracts. In the present case the parties were contracting, the one with reference to the purchase of the business and the assumption of the debts and liabilities, and the other in reference to a sale of the business and a release from the debts and liabilities, and we see no reason why the word "liabilities" should be given a restricted meaning. There is no enumeration of the debts and liabilities to be assumed by the defendant, and the natural inference would be that he was to assume all of them. The words "as the same shall

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fall due" do not indicate that the "liabilities" were those arising *ex contractu*, but rather that the parties intended to guard against indefinite delay in the settlement by the defendant of the debts and liabilities of the firm.

The defendant further contends that the agreement is illegal. But we see nothing illegal in an agreement by the continuing partner to indemnify the retiring partner against liabilities which do or may include an action for alleged false representations against the firm. Such an agreement is not an attempt by one wrongdoer to enforce contribution against another. Nor is it a case where two parties have conspired to commit an actionable wrong in consideration of the agreement by one of them to indemnify and hold harmless the other against the consequences thereof. The case before us relates to a tort for which the firm was liable and not to a crime which had been committed. As already observed we see nothing illegal in the agreement.

Exceptions overruled.

SAMUEL HYDE & another *vs.* CITY OF FALL RIVER.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Witness, Cross-examination. *Practice, Civil*, Conduct of trial. *Damages*, For property taken or injured by statutory authority.

In the trial of a petition for damages from the abolition of a grade crossing of a highway, where no land of the petitioner was taken and he is entitled to recover only such special and peculiar damage as differs in kind from that suffered by the general public and for that reason is not entitled to recover for any damage arising from the discontinuance of a portion of the street as a public way, it is within the discretion of the presiding judge to allow the respondent to ask the petitioner's expert witnesses in cross-examination whether in their judgment the decrease in the volume of travel by the elimination of the grades had not affected the market value of the estate, this exercise of discretion being proper, whether the question is regarded as an effort to ascertain the elements of damage upon which the opinion of the witnesses was based, or whether it is regarded as bearing upon a contention of the respondent that no damage had been suffered except that which arose from the discontinuance.

In the trial of a petition for damages from the abolition of a grade crossing of a highway, where no land of the petitioner was taken and he is entitled to recover only such special and peculiar damage as differs in kind from that suffered by

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the general public and for that reason is not entitled to recover for any damage arising from the discontinuance of a portion of the street as a public way, after expert witnesses for the respondent have given opinions expressly excluding any damages from the diminished travel or less convenient access because of the discontinuance, and the petitioner has been permitted to cross-examine the witnesses fully as to the basis upon which their opinions rest, it is a proper exercise of the discretion of the presiding judge to refuse to allow the petitioner to cross-examine the witnesses further for the purpose of obtaining from them an opinion as to how much the estimate given would be increased if damages for the discontinuance were included or to test their soundness of opinion by a comparison between the value given by them and the entire damage suffered from both sources or from the discontinuance alone.

PETITION, filed on December 31, 1902, under St. 1890, as amended by St. 1901, c. 123, now R. L. c. 111, §§ 149–160, for damages to land of the petitioners caused by the abolition of the grade crossing of Ferry Street in Fall River by the railroad of the Old Colony Railroad Company, the change of grade having been made by the construction of a street upon an embankment supported by a retaining wall forty feet away from the land of the petitioners on the opposite side of the street.

The first trial of the case was before *Lawton*, J., who ordered a verdict for the respondent and reported the case for determination by this court. This court, in a decision reported in 189 Mass. 439, ordered that the verdict be set aside on the ground that the petitioners were entitled to recover any special and peculiar damage which their land had suffered.

There was a new trial in the Superior Court before *White*, J. The judge excluded certain questions put by the petitioners to an expert witness of the respondent on his cross-examination, after having allowed the questions which are described in the opinion to be put by the respondent to the expert witnesses of the petitioners.

The questions excluded were as follows:

"What was the value of this property after these changes were made?"

"Have you considered what the value of this property would be if Ferry Street ran under the bridge just as it did before and was open to the water front?"

"Now I ask you, do you think it would make any difference to this property if the street had been left open and these structures built there?"

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The jury returned a verdict for the petitioners in the sum of $589; and the petitioners alleged exceptions.

J. W. Cummings, (*C. R. Cummings* with him,) for the petitioners.

H. A. Dubuque, (*F. S. Hall* with him,) for the respondent.

BRALEY, J. In *Hyde* v. *Fall River*, 189 Mass. 439, it was held that the petitioners could recover for any direct and specific damage caused to their estate by the erection and maintenance of the embankment on the opposite side of the street, but for any inconvenience and injury arising from the discontinuance of a portion of the street as a public way, their damage being of the same kind even if greater in degree than that of the general public, there was no remedy.

At the second trial the petitioners introduced evidence that the rental and present value of the premises as a whole had been very appreciably diminished by the changes wrought through the erection of the embankment and connecting bridges. The changes made, including the discontinuance of a portion of the street, were part of a general plan for the abolition of certain grade crossings, and the respondent, against the objection, but without an exception, of the petitioners, was allowed in cross-examination of the petitioner's expert witnesses to inquire whether the decrease in the volume of travel by the elimination of the grades in their judgment had not affected the market value of the estate. But, if regarded either as an effort to ascertain the elements of damage upon which the opinion of the various witnesses was based, or as bearing upon the contention that no damage whatever had been suffered except that which arose from the discontinuance alone, the extent to which the cross-examination should be pursued was within the sound discretion of the presiding judge. It would seem at first that a similar latitude justly should have been permitted in the questions asked in cross-examination of the respondent's witnesses, to the exclusion of which the petitioners excepted. But there is a distinct difference. The opinions given by them having expressly excluded any damage which followed from the decreased travel or less convenience of access because of the discontinuance, the object of the cross-examination must have been to obtain from them an opinion as to how much the estimate given

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would be increased if such damages were included, or to test their soundness of opinion by a comparison between the value given by them and the entire damage suffered from both sources, or from the discontinuance alone. Upon the first ground, the petitioners expressly disclaimed any right of recovery, and after such disclaimer the inquiry became a collateral issue likely not only to confuse, but to mislead, the jury. When the counsel for the petitioners had been permitted fully to examine as to the basis upon which their opinion rested, any further interrogation, in whatever form propounded, also was discretionary. This salutary power to direct the proper course of a trial not appearing to have been unjustly exercised, the petitioners' exceptions are groundless. *Jennings* v. *Rooney*, 183 Mass. 577, 579. *Commonwealth* v. *Johnson*, 188 Mass. 382, 385. *Sullivan* v. *Fugazzi*, 193 Mass. 518.

Exceptions overruled.

JOHN B. COOK *vs.* ENTERPRISE TRANSPORTATION COMPANY.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Practice, Civil, Exceptions, Offer of proof. *Custom.*

An exception to the exclusion of a question to a witness cannot be sustained unless the bill of exceptions shows that the substance of the evidence which was expected in reply was stated to the presiding judge and unless upon such statement it appears that the excepting party was harmed by the exclusion.

In an action against a navigation company for the alleged breach of an express contract to hire the plaintiff for one year as a steamboat captain at a salary of $1,500 a year, where the defendant did not deny the hiring of the plaintiff but alleged that he was hired for an indefinite period and was discharged in accordance with the terms of the contract, the defendant, having called its general manager as a witness, asked him, "What is the custom in steamship circles with regard to hiring of men?" The judge excluded the question, whereupon the defendant's counsel said, "It seems to me, where the contract is very ambiguous as to time, that any evidence of a custom in hiring for a certain time is relevant." The judge still excluded the question. *Held*, that, even if the statement of the defendant's counsel amounted to an offer of proof, the exclusion of the evidence did not appear to have injured the defendant, as the statement apparently referred to a custom of hiring for a certain time and not for an indefinite period,

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which would tend to support the plaintiff's view of the contract rather than that of the defendant, so that the exclusion of the evidence could not have harmed the defendant.

In an action against a navigation company for the alleged breach of an express contract to hire the plaintiff for one year as a steamboat captain at a salary of $1,500 a year, where the defendant did not deny the hiring of the plaintiff but alleged that he was hired for an indefinite period and was discharged in accordance with the terms of the contract, the defendant asked a witness, "Do you know what the custom is in [the port where the contract was made] with regard to hiring captains and officers of steamboats?" The presiding judge excluded this question and the defendant excepted. The defendant then asked the witness "Do you know whether there is a custom which would be known generally to people employing officers of steamship companies?" This was excluded but the defendant did not except. The defendant's counsel said, "I offer this in evidence, first, as being the custom, showing the intention of the parties at the time this contract was made, and also as being corroborative of [the defendant's general manager's] statement that there was no contract." *Held*, that as the first question was accompanied by no offer of proof the exception to its exclusion must be overruled, and to the second question, respecting which an offer was made, no exception was taken, so that no question of law was before this court, but *it was said* that, even if the rights of the defendant had been saved fully, the offer of proof as to a custom was too general and indefinite to be of any aid in dealing with the issues on trial.

CONTRACT, with a declaration as follows: "And the plaintiff says that he made an agreement with the defendant corporation to work for it as a steamboat captain for the term of one year beginning the thirty-first day of May, 1905, at a salary of $1,500 per year; that the defendant nevertheless refused to perform its said agreement and refused to employ the plaintiff or to pay him any part of his salary, and repudiated said agreement; that the plaintiff has always held himself in readiness to complete and perform his said agreement and has been unable to obtain any other employment; and that the defendant owes him the sum of $1,500 on account of said agreement and the breach thereof." Writ dated March 23, 1906.

In the Superior Court the case was tried before *Dana*, J. The answer was a general denial. The defendant's counsel in opening said that the plaintiff under the declaration could not recover, unless the jury found that there was a hiring of the plaintiff by the defendant for a year at a salary of $1,500 for such year; that there was no such hiring; that the hiring was for an indefinite period; that the defendant had the right to discharge the plaintiff at any time; that the defendant had discharged the plaintiff shortly after the time of the hiring; and that the

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plaintiff could recover under any form of declaration only for such services as were rendered by him up to the date of his discharge.

The rulings of the judge in regard to the exclusion of certain evidence offered by the defendant are stated in the opinion.

The judge, in the course of his charge to the jury, to which no exception was taken, gave the following instruction:

"I do not understand that there is any contention on the part of the defendant that no contract was made; I understand the defendant to admit that there was a contract between the plaintiff and the defendant, but the defendant says that the contract made between the plaintiff and the defendant was not the contract set out in the plaintiff's declaration, and in order for the plaintiff to recover in this case you must find that the contract was the contract set out in the plaintiff's declaration. By the terms of that declaration, as I have said, the plaintiff alleges that the contract was a hiring for a salary of $1,500 a year, and a hiring for a year. The defendant says that the term of service was indefinite; that there was no fixed time. If you find upon all the evidence that there was a contract for a fixed period, the plaintiff would be entitled to recover; and if you find, on the other hand, that there was no contract for a fixed period, then the plaintiff on this declaration would not be entitled to recover."

The jury returned a verdict for the plaintiff in the sum of $1,275; and the defendant alleged exceptions.

G. E. Daniels, for the defendant.

C. R. Cummings, (*J. W. Cummings & J. Little* with him,) for the plaintiff.

RUGG, J. The plaintiff seeks to recover for breach of an express, oral contract to employ him as captain of a steamboat for one year, at a salary of $1,500. The plaintiff introduced evidence tending to support his contention. The defendant's exceptions relate solely to evidence. One Brady, the vice-president and general manager of the defendant, was asked, "What is the custom in steamship circles with regard to hiring of men?" This inquiry was excluded upon objection, whereupon the defendant's attorney said, "It seems to me, where the contract is very ambiguous as to the time, that any evidence of a custom in hiring for a cer-

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tain time is relevant." To this the judge replied, "The plaintiff says that the defendant did hire him for a certain length of time and the defendant says that it did not and that presents an issue on a question of fact. I should exclude it." Of one Brown, the defendant inquired, "I should like to ask you what the custom was in steamship circles about hiring." This question was excluded and the defendant excepted. When another witness, one Trainor, was on the stand, this occurred: He was asked by defendant's attorney, "Do you know what the custom is . . . in Fall River with regard to hiring captains and officers of steamboats?" Upon objection, this was excluded and exception was taken, the judge remarking, "Yes, this is the same question you have asked before." The next question was, "Do you know whether there is a custom which would be known generally to people employing officers of steamship companies?" This was excluded upon objection, but no exception was taken to the ruling, although the attorney then remarked, "I offer this in evidence, first, as being the custom, showing the intention of the parties at the time this contract was made, and also as being corroborative of Mr. Brady's statement that there was no contract."

It is a familiar rule of practice that ordinarily no exception can be sustained to a refusal to permit a question to be put unless the substance of the evidence which is expected in reply is stated to the court. *Warren* v. *Spencer Water Co.* 143 Mass. 155. Unless this is done, the record is bare of any indication that harm was done by the ruling.

As to the first inquiry excluded, the statement of defendant's counsel hardly amounted to an offer of proof. But if what occurred be treated as an offer of proof, the exclusion does not appear to have injured the defendant. Its defence, as revealed by the record, appears to have been, not that no contract whatsoever was made, but that a different contract was made from that alleged by the plaintiff. The plaintiff contended that a definite contract for the fixed term of one year was made, while the defendant asserted that the hiring was for an indefinite time. The statement of the defendant's attorney was apparently of a custom of hiring for a certain time and not for an indefinite period, which would tend to support the plaintiff's view rather than that

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of the defendant. Therefore, its exclusion cannot have wrought any wrong to it. No offer of proof purports to have been made respecting the excluded question to Brown, so that the exception to this ruling must be overruled. As to the excluded questions addressed to Trainor, where exception was taken, no offer of proof was made, so the exception must be overruled, while, as to the inquiry respecting which an offer was made, no exception was saved; hence no question of law is before us. But even if the rights of the defendant had been fully saved, the offer, as to a custom, was too general and indefinite to be of any aid in passing upon the issues raised. It was not enough confined in substantial respects to bear upon the issues on trial.

Exceptions overruled.

SARAH C. LIMA *vs.* CHARLES C. COOK, BRIDGET CAMPBELL, claimant.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Deed. Trust. Uses, Statute of. Practice, Civil, Verdict, Money paid into court. *Claimant.*

A woman of advanced age and physically weak, with two daughters, one of whom neglected her and the other of whom lived with her and nursed and cared for her, having previously made a power of attorney irrevocable for five years to an agent with whom she and her faithful daughter had had many disagreements about her business, desiring to be relieved from the care and worry involved in the management of her property which consisted principally of rentable real estate, made a quitclaim deed of all her property to her faithful daughter, her heirs and assigns "in trust for myself during the term of my natural life and upon and after my death in trust for the benefit of said grantee and her heirs and assigns forever." *Held*, that although a possible construction of the words of the deed was that the use was executed by the statute of uses and that the grantor obtained a legal estate for life with a remainder in fee to the grantee and her heirs, yet, under the circumstances mentioned above, the more natural and the true construction was that the grant was upon a trust or a use upon a use which remained unexecuted, and that the grantee took the estate in fee in trust for the benefit of the grantor during her life.

In an action, by the trustee under a deed made by a woman of advanced age and physically weak conveying all her property to the plaintiff in trust for the bene-

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fit of the grantor during her life, against a person previously appointed by the grantor as her agent, to recover rents collected by him from the real estate of such grantor and not paid over, where the defendant has paid into court the money collected by him and has caused the beneficiary to be made a party as claimant, and the presiding judge has ordered a verdict for the claimant, such verdict will not be set aside upon a decision by this court that the plaintiff is entitled to the money, as all that the plaintiff could do with the money, if paid to him, would be to pass it over to the claimant, an idle ceremony which the law does not require.

CONTRACT for the sum of $100 in the hands of the defendant Cook collected by him as rents alleged to belong to the plaintiff under a deed of trust made by one Bridget Campbell. Writ dated August 24, 1906.

The defendant Cook deposited in court the amount claimed in the declaration, and stated, under the statutes, that the money was claimed by Bridget Campbell, through her conservator, Thomas R. Burrill. Burrill entered the appearance of Bridget Campbell as claimant and joined issue as appeared by the pleadings. In the Superior Court the case came on to be tried before *White*, J. The plaintiff made the following offer of proof:

"One John Campbell, of Fall River, died on March 2, 1889, leaving a widow, Bridget Campbell, now about seventy-seven years old, living in Fall River, and two daughters, Sarah Campbell Lima, the plaintiff, and Margaret A. O'Connor, both of Fall River. John Campbell left a will by which he divided the estate equally among the widow and the two daughters, giving one third thereof to each.

"The estate consisted mostly of rentable real estate now valued at about $63,000. The income coming to each is about $80 a month. On April 10, 1905, Bridget Campbell, Sarah Campbell Lima and Margaret A. O'Connor gave a joint and irrevocable power of attorney for five years to the defendant Cook.* About nine years ago Bridget Campbell suffered a paralytic shock, which though it did not affect her mentally, leaving her mind entirely unimpaired, disabled her physically, so that for several years she has been unable to walk without a cane and for the last two years has been hardly able to get about at all. Since her father's death Margaret has never shown any kindness

* This instrument is printed in the report of the case of *Campbell* v. *Cook*, 193 Mass. 251, 252-254.

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to her mother. All these years she tried to get all she could out of her in the way of money and property. The plaintiff on the other hand has been living with her mother before and since her father's death. While her mother was enjoying health the plaintiff managed the house and relieved her of all care. During her sickness for the last eight years the plaintiff has nursed and cared for her. In March, 1905, the plaintiff married one Anthony J. T. Lima, a dentist, and since that time both the plaintiff and her husband have made every effort for the comfort of Bridget Campbell.

"Shortly after the power of attorney was given to the defendant Cook, the latter caused much annoyance and trouble to the plaintiff and her mother. He had a bank book in his possession which belonged to Bridget Campbell and which he refused to give up to her until suit was pressed. He had a mortgage deed in his custody belonging to Bridget Campbell which he refused to give up until suit was brought. Said deed was given upon the very morning of the trial. In the month of October or November of 1905 request was repeatedly made of the defendant Cook to render an itemized account of his doings in the estate under his power of attorney, and to disclose what insurance was carried upon the estate and where and how much was paid. This the defendant Cook refused to do until suit was brought and the Supreme Judicial Court decided that he must grant the prayer of his principals.*

"To be relieved of the care and worry involved in the management of her property, Bridget Campbell, on December 2, 1905, made a deed to the plaintiff of all her share of the real estate coming to her under her husband's will (a copy of which deed, marked B, is hereto annexed and made a part hereof).

"The consideration of the said deed was the affection which the said Bridget had for the plaintiff and the kindness of the plaintiff and her husband towards her, and the promise by the plaintiff that she would care and support her for life and use the estate for her benefit so long as she lived and the plaintiff should have it at her death.

"On July 13, 1906, the Probate Court appointed Thomas

* See *Campbell* v. *Cook*, 193 Mass. 251.

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R. Burrill a conservator to Bridget Campbell. On or about August 1, 1906, before the bringing of this action, the plaintiff demanded of the defendant Cook the income due to Bridget Campbell and which by said deed should be paid to the plaintiff. The defendant Cook refused to pay the same on the ground that the claimant Bridget Campbell by her conservator Burrill directed the money should be paid to herself. The amount which the defendant Cook had in his hands at the time the demand was made is $160."

At the request of the claimant Campbell the judge directed a verdict *pro forma* for the claimant against the objections and exceptions of the plaintiff, and at the request of the parties reported the case for determination by this court. If the ruling of the judge was wrong, the case was to be remanded for trial in the Superior Court; otherwise, judgment was to be entered for the claimant on the verdict.

The copy of the deed of Bridget Campbell marked B was as follows:

"Exhibit B.

"Know all Men by these Presents:

that I, Bridget Campbell of Fall River, County of Bristol and Commonwealth of Massachusetts, in consideration of one dollar and other considerations, paid by Sarah Campbell Lima of Fall River in said County and State, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quitclaim unto the said Sarah Campbell Lima all my right, title and interest in the John Campbell estate wherever situated in the said city of Fall River; said right, title and interest having been acquired by me through the will of the late John Campbell, my late husband. Said estate comprises among other properties, land and buildings situated on Tenth and Pleasant Streets, South Main and Spring Streets, Columbia and Pearl Streets and Washington Street and lot on Holland Street, all in Fall River.

"To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said Sarah Campbell Lima and her heirs and assigns,

"In trust for myself during the term of my natural life and upon and after my death in trust for the benefit of the said grantee and her heirs and assigns forever.

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"In witness whereof I, the said Bridget Campbell, hereunto set my hand and seal this second day of December in the year one thousand nine hundred and five.

"Signed and sealed in presence of

"David R. Radovsky. her

"Bridget x Campbell (S)"

mark

Here followed certificates of acknowledgment and registration.

D. R. Radovsky, (*H. A. Dubuque* with him,) for the plaintiff.

C. R. Cummings, (*J. W. Cummings* with him,) for the claimant.

BRALEY, J. The deed in its terms being sufficient to transfer the title, and give effect to the intention of the parties, any further consideration of the form of the conveyance, although without covenants either of seisin, or of the right to convey, or of warranty, becomes unnecessary. *Hunt* v. *Hunt*, 14 Pick. 374. *Kyle* v. *Kavanagh*, 103 Mass. 356. *Sawyer* v. *Cook*, 188 Mass. 163, 165. In limitation of the habendum, the grantor uses this language, "in trust for myself during the term of my natural life and upon and after my death in trust for the benefit of the said grantee and her heirs and assigns forever." A possible construction of this clause would be, that the use was executed by the statute of uses, and the grantor obtained a legal estate for life, with a remainder in fee to the grantee and her heirs. *Richardson* v. *Stodder*, 100 Mass. 528, 529. *Carr* v. *Richardson*, 157 Mass. 576, 577. But while the question is one of some nicety, by reason of the great subtilty in the distinctions which have arisen under the statute, the more natural construction under the circumstances attendant upon her advanced age, her family relations, and business differences with the co-defendant, is, that the grant was upon a trust, or a use upon a use, which remained unexecuted. The plaintiff accordingly took the estate in fee, and in trust for the benefit of the grantor during her life. *Packard* v. *Old Colony Railroad*, 168 Mass. 92, 96. *Dakin* v. *Savage*, 172 Mass. 23, 27. It does not, however, follow that the verdict for the defendant was wrongly ordered. The equitable life tenant's share in the rents which had been collected had been deposited in court pending the litigation, and was subject to its order, and all that remained was to direct the payment of the fund to the beneficiary to whom alone it belonged. There being

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no active duty devolving upon the trustee during the life of the agreement with Cook, this payment properly could be made without her intervention. Under these conditions to direct the payment to be made to the plaintiff, who at once must pass the money over to the equitable owner would be an idle ceremony, which the law does not require. *Underwood* v. *Boston Five Cents Savings Bank*, 141 Mass. 305, 306.

Judgment for the claimant on the verdict.

WILLIAM R. SMITH *vs.* WILLIAM S. GREENE, JOHN McMAHON, claimant.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, SHELDON, & RUGG, JJ.

Contract, Performance and breach. *Sale.*

The owner of certain real estate made an agreement in writing to sell it to one who, as part of the agreement, made an advance payment to an agent of the owner, but who, later, but before the time agreed upon for delivery of the deed, for a reason in no way connected with the ability of the owner to convey a good title, declined to carry out the agreement. The owner brought an action of contract against the agent for the advance payment and, the person who made the payment claiming the money, he was summoned in as a defendant. At the trial of the action, it appeared that the owner's title was encumbered at the time when the agreement with the claimant was made, and the claimant contended that this excused him from performance. The presiding judge refused to direct a verdict for the claimant, but instructed the jury that, in order to entitle the plaintiff to recover, he was bound to show that he had tendered a deed or that the conduct of the claimant excused him from doing so. The jury found for the plaintiff. *Held*, that, in the absence of anything in the agreement to that effect, the vendor was not required to have a good title at the time when the agreement was entered into and from then until the time of performance, and that the ruling of the presiding judge was correct and the verdict of the jury warranted.

CONTRACT for a sum of money alleged to have been a payment made to an agent by one who agreed to purchase land from the plaintiff and who, after making the payment, refused to carry out his contract. The agent was the defendant and the

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person who made the payment was made a party defendant as a claimant under R. L. c. 173, § 37. Writ in the Superior Court for the county of Bristol dated April 21, 1906.

There was a trial before *Dana*, J., who refused to direct a verdict for the claimant, and the claimant excepted. The facts are stated in the opinion.

C. R. Cummings, (*J. W. Cummings* with him,) for the claimant.

M. R. Hitch, (*M. C. Fisher* with him,) for the plaintiff.

MORTON, J. The claimant McMahon, whom we shall speak of as the defendant, entered into an agreement with the plaintiff to buy, and the plaintiff agreed to sell, certain real estate belonging to the plaintiff situated in Fall River. The sale was made through a broker and a memorandum of the agreement was reduced to writing and signed by him. The memorandum recited that the broker had received from McMahon $500 on account of and in part payment of the real estate sold and that the balance was to be paid on delivery of the deed. Before the time came for the delivery of the deed, the defendant refused to complete the purchase and take a deed, and this action was thereupon brought by the plaintiff against the broker to recover from him the $500 which had been paid to him as aforesaid by the defendant. The defendant was admitted as claimant and thenceforward the action was prosecuted between him and the plaintiff. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to certain rulings and refusals to rule by the presiding judge.

At the time the agreement was entered into, the property was subject to certain incumbrances by way of lease and mortgage, and the defendant contended and asked the court to rule that the plaintiff was not entitled to recover because he was not able to perform his agreement by reason of said encumbrances. The presiding judge refused so to rule, and instructed the jury in substance that, in order to entitle him to recover, the plaintiff was bound to show that a tender of a deed had been made, unless he was excused from making such tender by the conduct of the defendant, and that the fact that there were encumbrances on the property did not excuse the defendant from refusing to perform, since it was not to be inferred that the plaintiff could not have extinguished them and delivered a good title.

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The instructions assumed, and correctly, that the plaintiff was bound under the agreement to convey a good title free from all encumbrances. *Swan* v. *Drury*, 22 Pick. 485. And, if the defendant had waited till the time came for the delivery of the deed, and the property then had been subject to mortgages and liens, he would have been justified in refusing to accept the deed, and would have been entitled to recover back the money which he had paid to the broker. But he did not wait, and did not, so far as appears, put his refusal to take a deed and complete the purchase on the ground that there were encumbrances upon the property, but on the ground that an abutting owner would object in the following May to a renewal of the liquor license which had been transferred on his application to the premises in question, and that for that reason he did not want the property. Under those circumstances the fact that the property was subject to encumbrances was immaterial except, as the court in substance told the jury, so far as it bore upon the question whether there was an absolute refusal on the defendant's part to take a deed and complete the purchase. *Howland* v. *Leach*, 11 Pick. 151. *Dresel* v. *Jordan*, 104 Mass. 407. *Carpenter* v. *Holcomb*, 105 Mass. 280. *Curtis* v. *Aspinwall*, 114 Mass. 187. *Wells* v. *Day*, 124 Mass. 38. There is nothing to show that the plaintiff was not willing to perform, or that he would not have been ready to perform when the time for performance arrived. He was not obliged to be able to give a good title free from encumbrances during the whole intervening time, but only when the time for performance arrived. *Curtis* v. *Aspinwall*, *supra*. And the fact that the property was subject to encumbrances when the agreement was entered into and when the defendant refused to take a deed afforded no justification to him for his repudiation of his agreement before the time for performance had arrived. In the absence of anything in the agreement to that effect, there is no law which requires that a vendor should have a good title free from encumbrances at the time when the agreement is entered into, and during the time between that and the arrival of the time when the agreement is to be performed. *Carpenter* v. *Holcomb*, *supra*. *Dresel* v. *Jordan*, *supra*.

The money having been paid by the defendant to the broker as the agent of the plaintiff in part payment of the property

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sold, the case stands as it would have stood if the money had been paid to the plaintiff himself, in which case it is clear that, upon the defendant's refusal to take a deed and complete the purchase, the plaintiff would have been entitled to retain the money. It is not contended, indeed, that as between him and the broker, the plaintiff is not entitled to recover.

We discover no error in the manner in which the court dealt with the case.

Exceptions overruled.

FRANK M. McCOMBS *vs.* CARLETON S. ELMES.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To restrain foreclosure of a mortgage. *Mortgage*, Of real estate, Technical breach.

At the hearing on a bill in equity by a mortgagor to restrain the foreclosure of a mortgage of real estate, it appeared that the only breach alleged was a failure to insure in accordance with the terms of the mortgage which required the mortgagor to procure insurance upon the property in companies to be approved by the mortgagee, but which contained no clause making the entire amount secured by the mortgage due upon the breach of the condition as to insurance. Insurance which formerly was upon the property had been cancelled by the insurer and the property had remained for one day uninsured, when the mortgagor procured other insurance and submitted it to the mortgagee, who refused to approve of any insurance except by the original insurer. The plaintiff offered in his bill to procure insurance in other companies. *Held*, that the defendant in effect refused to accept any insurance and insisted upon a foreclosure, that the technical breach of the mortgage was without harm to the defendant, and that the plaintiff did all he could to cure it and should have the relief sought against the harsh enforcement of the legal obligation in the mortgage.

BILL IN EQUITY to restrain the foreclosure of a mortgage filed in the Superior Court for the county of Bristol, April 13, 1907.

The case was referred to a master and was heard upon his report by *Fox*, J., who made a final decree enjoining the foreclosure, and the defendant appealed. The facts are stated in the opinion.

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The case was submitted on briefs.

A. R. White, 2d, for the defendant.

R. B. McDaniel, for the plaintiff.

RUGG, J. The plaintiff brings this bill in equity to restrain the foreclosure of a certain mortgage upon his real estate held by the defendant and given to secure a note payable in instalments on time. The only breach claimed is a failure to insure the buildings upon the estate. Prior to March 8, 1907, the buildings were insured for $1,250 in the Hingham Mutual Fire Insurance Company, and for $750 in the Traders and Mechanics Insurance Company. On that date, the insurance agent, who had issued the policies, wrote to the defendant stating that the insurance companies had requested him to cancel the policies at once, and that he should be obliged to cancel them in ten days, at the same time notifying the plaintiff's attorney.

On March 22, the agent again wrote to the plaintiff's attorney that he should be obliged to cancel the policies at once, enclosing check for the return premium and a receipt, requesting that the latter be signed and returned. He informed the defendant of this action. On April 1, the defendant entered upon the premises described in the mortgage, and on April 2, and again on April 9 and 16, published notices of a sale, all for the purpose of foreclosure. On April 2, the defendant's attorney received from the agent of the plaintiff an insurance binder for $1,500 insurance on the property in the American Central Insurance Company and for $1,000 in the Hamburg-Bremen Fire Insurance Company. On April 4, the defendant, through his attorney, replied to the plaintiff's agent that the defendant had, previous to the receipt of the binder, ordered the mortgage foreclosed by reason of the mortgagor's failure to keep the property insured, and that he did not approve the companies and would proceed with the foreclosure. On April 5, two policies of insurance, each for $1,150, in Massachusetts standard form in the two companies last named, payable to the defendant as mortgagee, dated April 3, but covering the property for one year from noon of March 29, 1907, were delivered to the defendant. The defendant refused to accept these or any other policies, except in the Hingham Mutual Fire Insurance Company. This was in effect a refusal to accept any policy whatever, for he

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knew that the company he named would not issue a policy upon the property. He offered no explanation of this conduct and by his attitude asserts a right to insist upon a technical breach of the condition and consequent forfeiture of the rights of the plaintiff. The plaintiff offered to procure insurance in any other companies which the defendant would suggest, and hold the policies for the benefit of the defendant.

It is doubtful whether the acts of the insurance agent amounted to a cancellation of the first policies in accordance with the terms of the Massachusetts standard policy. R. L. c. 118, § 60. But conceding that effect, these policies continued in force at least until April 1, and on the next day the property was reinsured and the policies actually were delivered to the defendant on April 5.

These facts show at most a mere technical breach of the insurance condition of the mortgage, which was promptly cured in such a way that the defendant suffered no actual harm, so far as it was possible for a cure to be effected by the mortgagor without the co-operation of the mortgagee. The mortgage contained no clause making the whole indebtedness due on breach of this condition. There is no overdue interest or unpaid instalment of principal. Before the bill to redeem was filed, a tender of sufficient insurance in companies which ought to satisfy any reasonable mortgagee had been actually sent to the defendant or his agent, and the property had been uninsured for a period of one day at longest. The mortgage contained the usual clause that the mortgagor should procure insurance upon the property in companies to be approved by the mortgagee. But an express determination on the part of the mortgagee to be satisfied only with a policy in a particular company and that, one which he knew would not issue a policy upon the property, cannot commend itself to a court of equity. This is especially true, since, prior to the cancellation of the policies, insurance had been accepted by the mortgagee in two companies. The plaintiff brings himself within the provisions of R. L. c. 187, § 22, by having tendered sufficient insurance which is held for the benefit of the defendant, and offering in his bill to procure policies in other companies. The only thing that was due under the conditions of the mortgage was sufficient insurance. It is the prerogative

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of a court of equity to relieve against precisely such harsh enforcement of legal obligations in mortgages as presented in this record. As was said by Lathrop, J., in *Wilson* v. *Mulloney*, 185 Mass. 430, "It cannot seriously be contended that, on a bill in equity to redeem a mortgage, the fact that the conditions agreed upon have not been strictly performed is any defence." The decree is to be so modified as to include the costs of this appeal, and, as modified, is affirmed.

So ordered.

ANDREW J. PAINE *vs.* GEORGE J. KELLEY.

Bristol. October 28, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Arrest, On mesne process. *Statute*, Construction. *Unlawful Arrest*. *False Imprisonment*. *Abuse of Legal Process*. *Pleading*, *Civil*, Declaration. *Damages*.

The provisions of R. L. c. 168, § 1, with regard to arrest on mesne process in an action of contract, are not to be extended by construction.

A defendant must have been within the borders of the Commonwealth in order to have an intention "to leave" it within the meaning of R. L. c. 168, § 1, authorizing his arrest on mesne process if the plaintiff makes affidavit before a magistrate that the defendant "intends to leave the Commonwealth, so that execution, if obtained, cannot be served upon him."

An affidavit, that a defendant is about to leave the Commonwealth so that execution, if obtained, cannot be served upon him, made before a magistrate under R. L. c. 168, § 1, for the purpose of procuring a certificate to be attached to a writ authorizing his arrest on mesne process in an action of contract, is false if, at the time when it is made, the defendant is not within the Commonwealth, although at that time he is on a journey hither and intends, after a stay of less than an hour, again to leave.

At the trial of an action of tort for falsely procuring the plaintiff, a resident of another State, to come within this Commonwealth for the purpose of causing his arrest on mesne process in an action of contract, and then arresting him, there was evidence tending to show that the defendant resided in Attleboro in this Commonwealth, and that the plaintiff and the defendant had an appointment on a certain day in Providence in the State of Rhode Island; that, the day before the appointment, the defendant wrote to the plaintiff stating that he was ill and desired the plaintiff to meet him in Attleboro instead of in Providence and offering to pay the expenses which the plaintiff would incur in doing so; that, on the day of the appointment, in a telephone communication, the defendant again urged the plaintiff to come to him in Attleboro because he was ill and unfit for travel and stated that the plaintiff could arrive on the train leaving Providence at 12.07 P. M. and leave Attleboro again at 12.54 P. M.; that the

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plaintiff, for accommodation of the defendant, promised to do so; that the defendant, while the plaintiff was on his journey from Providence, made the affidavit and procured the certificate necessary, under R. L. c. 168, § 1, to authorize an arrest of the plaintiff on mesne process, and, after the plaintiff arrived in Attleboro, caused his arrest. The plaintiff testified that, at the time of the interview when the arrest was made, the defendant "did not seem sick so far as he could see." *Held*, that there was evidence warranting the submission of the case to the jury.

An objection by a defendant that a declaration in a single count is bad for duplicity, made, not by demurrer, but after he has answered and gone to trial upon the merits, comes too late at the argument in this court upon exceptions taken to rulings upon other matters at the trial.

Instructions to the jury, before whom was being tried an action for false imprisonment, that they were not to give exemplary damages but only fair and reasonable compensation, were *held* to be correct.

TORT for false imprisonment. Writ in the Superior Court for the county of Bristol dated April 17, 1905.

The declaration was in a single count and alleged that the defendant, intending to arrest the plaintiff on mesne process in an action of contract, fraudulently induced him to come into this Commonwealth from Rhode Island, falsely made the oath required by R. L. c. 168, § 1, and caused his arrest and imprisonment.

At the trial, which was before *Hardy*, J., there was evidence that the defendant had an appointment with the plaintiff in Providence, Rhode Island, for the morning of March 18, on a matter of business not material to this action. On March 17, the defendant wrote to the plaintiff stating that he was not well and would like to have the plaintiff come to Attleboro to transact the business, stating that he would pay the plaintiff's expenses for the journey and requesting him to telephone whether or not he would do so. The plaintiff telephoned at 11.30 in the morning of March 18, and, according to his testimony, the defendant then promised that "everything was all fixed" and that the plaintiff could "come out on the seven minutes past twelve train . . . and that he could return on the six minutes to one train," and that he told the defendant that he would take a train leaving Providence for Attleboro at 12.07 P. M.

In the meantime, an attorney for the defendant had made out a capias writ against the plaintiff and left it with a magistrate for a certificate authorizing arrest under R. L. c. 168, § 1, and later the defendant made before the magistrate an affidavit that the plaintiff intended to leave the Commonwealth so that execution, if obtained, could not be served upon him, and pro-

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cured such certificate, but the precise time of his making the affidavit was in dispute, the magistrate testifying it was "between eleven and twelve o'clock in the morning," and the defendant testifying that it was between 12.15 and 12.20 in the afternoon. There was evidence that the defendant gave the writ and certificate to the arresting officer at 12.20, and that the train from Providence, upon which the plaintiff was, arrived almost immediately. There also was testimony to the effect that it took twelve minutes for the train to reach Attelboro after it crossed the State line from Rhode Island.

Upon the arrival of the train, the plaintiff immediately went to the defendant's office. He testified that the defendant "did not seem sick so far as he could see." After they had transacted their business, the defendant demanded payment of the claim which was the subject of the action upon which the capais writ had issued. The plaintiff said he owed nothing. Thereupon, according to the plaintiff's testimony, the defendant said "I consider you do, and I have had things fixed to keep you here until this bill is paid." A deputy sheriff, who was waiting in the next room, then was called and the plaintiff was arrested and confined in a "little low, damp cell under ground" for four or five hours.

At the close of the evidence, the defendant requested the presiding judge to rule that upon all the evidence in the case the jury must find for the defendant; and that it was not necessary for the plaintiff to have been within the Commonwealth at the exact time when the defendant made the affidavit before the magistrate provided for by R. L. c. 168, § 1.

The requests were refused and the defendant excepted. The presiding judge in his charge to the jury stated, among other things, subject to exceptions by the defendant: "If this man was without the precincts of the State, and this defendant knew it at the time when he made the affidavit, there would be no justification or excuse for his making such an affidavit; he would have no probable cause for making such an affidavit; and it would be your duty to find for the plaintiff upon that issue. That is all the law I can state to you on that proposition. . . .

"If you find upon this evidence that this affidavit was made truly, and if you find upon the evidence that Mr. Paine came into this State without any fraudulent inducement on the part

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of the defendant, then there is no liability here and your verdict should be for the defendant.

"If you find that he was not induced to come here by the defendant by any fraudulent means or devices or lures, as it is called in the law, if you find that there were no such means used to induce this plaintiff to come into the State, but you find that there was a false affidavit made whereby this man was illegally placed under arrest, then it would be your duty to find for the plaintiff upon that issue. If you find that there was no false affidavit made, but that this man Paine was induced to come into the State wrongfully, fraudulently, and by deceit, then it would be your duty to find for the plaintiff. So, in order to establish the liability here it is for you to say whether the plaintiff has satisfied you by a fair preponderance of the evidence that he has proved wrongful conduct on the part of the defendant in one or both of these elements which I have explained to you. If he has failed in that respect with reference to both elements claimed here, then your verdict should be for the defendant. If he has sustained that burden of proof with reference to the liability on either one of those elements, then on the question of liability your verdict should be for the plaintiff. . . .

"It is not for me to specify to you any standard whereby you can ascertain the extent of the damages here. It is for you to be reasonable, to act as men of common sense. . . . You are not here to give exemplary damages, as it is called; you are here to give only fair and reasonable compensation. The damages that are imposed in this case are not damages for punishment, only damages for compensation, and what is reasonable and fair under all the circumstances for what this man may have suffered in his mind and for what he may have endured in the way of discomfort. Nothing appears to show that he suffered anything in his business relations; nothing appears to show that he lost anything in a business way."

There was a verdict for the plaintiff, and the defendant alleged exceptions.

F. S. Hall, for the defendant.

D. R. Radovsky, for the plaintiff.

BRALEY, J. If the plaintiff's arrest and subsequent imprisonment at the procurement of the defendant were justified, because

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in accordance with due course of law, the first ruling requested should have been granted. The plaintiff, who was domiciled in another State, so long as he remained there was not amenable to civil process issued in this jurisdiction. If, however, he voluntarily came here, then, even if a non-resident, as the alleged contract upon which the action is brought followed his person, he became subject to our laws for the collection of debts, and not only could a valid service be made upon him, but any personal property in his possession subject to attachment might be seized, or he could be arrested and held to bail. *Barrell* v. *Benjamin*, 15 Mass. 354. *Peabody* v. *Hamilton*, 106 Mass. 217. But, before his body could be lawfully taken, there must be a strict compliance with the provisions of R. L. c. 168, § 1, which are not to be extended by construction, as the debtor is coerced by the penalty of imprisonment to make payment of his debt. Under the statute, the only ground upon which an arrest on mesne process can be authorized by the magistrate to whom the creditor or some one in his behalf applies, is, that the debtor "intends to leave the Commonwealth so that execution, if obtained, cannot be served upon him." The magistrate must determine upon evidence submitted to him whether there is satisfactory proof of this jurisdictional requirement before he lawfully can grant the certificate, and, although upon their face the proceedings may appear to be regular, yet the debtor, who has been forcibly detained thereunder, may show in an independent suit that the affidavit and certificate in fact were false. If this is found, then, the authority to arrest having been wrongly procured by the creditor, the arrest which follows is unlawful.

In order to have an intention "to leave the Commonwealth" within the meaning of the statute, the plaintiff first must have been bodily within its borders. He undoubtedly may have had a fixed purpose upon departure from home to return when the journey had been completed, but such intention could not ripen into a legal cause for his detention in a foreign jurisdiction, until the law of the forum had attached. In other words, as any interference with the plaintiff's right to personal liberty, which included his freedom of movement from place to place at will, was unjustifiable without the statutory certificate, so his apprehension and confinement, where upon the evidence the certificate

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could be found void because issued at a time when the magistrate had no jurisdiction of his person, affords no justification to the defendant by whom it was procured, and who directed the arrest. *Cody* v. *Adams*, 7 Gray, 59. *Winslow* v. *Hathaway*, 1 Pick. 210. *Clark* v. *Ward*, 7 Gray, 409. *Tellefsen* v. *Fee*, 168 Mass. 188. *Stephens* v. *Wilkins*, 6 Penn. St. 260.

But, distinct from any claim to redress arising from false imprisonment, the plaintiff put his right to recover upon the further ground that, even if it could have been found that he had arrived before the magistrate acted, his presence was involuntary. If, as alleged, he was induced by the false pretences of the defendant to come here with the purpose upon arrival of placing him under arrest, then he was not present of his own volition, but had attended under duress, because of the fraud practised upon him. The defendant, if found to have successfully pursued this policy, cannot be permitted under the formal guise of regularity of the proceedings to escape liability for this wrong, as such a result would confer upon him a benefit directly derived from an abuse of legal process, which the courts will not sanction. *Sweet* v. *Kimball*, 166 Mass. 332. *Wood* v. *Wood*, 78 Ky. 624. *Hill* v. *Goodrich*, 32 Conn. 588. *Wanzer* v. *Bright*, 52 Ill. 35. *Stein* v. *Valkenhuysen*, E., B. & E. 65.

It is now said that the count is bad for duplicity. This defence, however, comes too late, as, no demurrer having been interposed, the defendant answered and went to trial on the merits under a declaration which ambiguously set forth both causes of action. *Cronan* v. *Woburn*, 185 Mass. 91, 95.

The evidence being conflicting, the questions involved properly were left to the jury under suitable instructions. In submitting the measure of damages they were instructed that, while exemplary, or punitive, damages could not be awarded, the plaintiff could recover reasonable compensation for such mental distress and physical discomfort as he was shown to have suffered. These instructions were correct. *Derry* v. *Flitner*, 118 Mass. 131, 134. *Cook* v. *Brown*, 125 Mass. 503. *Flynn* v. *Butler*, 189 Mass. 377, 388. *Sweet* v. *Kimball*, *ubi supra*. *Bennett* v. *Sweet*, 171 Mass. 600, 601.

Exceptions overruled.

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WILLIAM HEFFERNAN *vs.* FALL RIVER IRON WORKS COMPANY.

Bristol. October 29, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Agency, Double employment. *Negligence*, Employer's liability.

At the trial of an action for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant in his cotton mill, there was evidence tending to show that the plaintiff was injured while cleaning a carding machine, that the carding machine was being set up in the defendant's mill by one L. under an agreement whereby the defendant was required to furnish "usual laborer's assistance," that the plaintiff was set to work and kept at work on the machine by one acting as superintendent for the defendant and, by order of such superintendent, was instructed in his work by one who was in the employ of L., that the plaintiff did not know that he was working for any one other than the defendant and had never heard of L., and that he was paid by the defendant. *Held*, that, in order to constitute the plaintiff the servant of L., there must have been such a change in his relations to the defendant that the defendant had ceased for the time being to have any direction over or control of him and that L. had become responsible for the discharge of those duties which a master owes to his servant in respect to matters affecting his safety; and that the question whether, at the time of the accident, such a change had occurred was for the jury.

At the trial of an action by one employed in a cotton mill to recover for personal injuries alleged to have been received by the plaintiff by reason of a failure of the defendant to warn him of the dangerous character of a machine upon which he was working, there was evidence tending to show that the plaintiff had been set to work before the accident by a superintendent of the defendant at cleaning rapidly revolving cylinders of carding machines, no one of which had attached to it an appliance called a licker-in, that a licker-in was another smaller cylinder with teeth upon it, which revolved on a separate axis outside of and in the opposite direction from, but close to, the main cylinder which the plaintiff was cleaning; that just before the accident the plaintiff was set to work cleaning the cylinder of a machine which had a licker-in that was wrapped up so that he could see only the wrappings, that he never had seen a licker-in and did not know of its character; that the superintendent who set him to work upon the machine with the licker-in had not warned him of its character, but had delegated the duty of instructing him to one who was not in the employ of the defendant, and that such person had not warned him of the character of the licker-in; that, while he was cleaning the main cylinder as he had been told to do, a stick that he was using slipped and his hand was drawn between the cylinders and was injured on the teeth of the licker-in. *Held*, that the questions, whether the plaintiff was in the exercise of due care, whether there was an obvious risk of injury or one which he assumed, and whether the defendant was negligent as alleged, were for the jury.

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TORT by one employed in a cotton mill for injuries received while cleaning a carding machine and alleged to be due to failure to instruct and warn him of the dangers of his occupation. Writ in the Superior Court for the county of Bristol dated March 12, 1906.

At the trial, which was before *Dana*, J., the plaintiff testified that at the time of his injury he was nineteen years of age and had been working for the defendant less than a month; that he never had worked as an operative in a mill nor had he ever operated any machinery; that, when he went to work for the defendant, he was hired by one Allen, who was his boss and told him what to do; that, about a week before the accident, Allen set him to work cleaning carding machines and had just started to show him how when a man named Schoules came along and Allen said "This gentleman will show you how to do it," and walked away. Schoules then showed him. After he had been at work as directed for a week, he was put to work at cleaning a carding machine which had a different appliance upon it, which, after the accident, he learned was a licker-in. This appliance is described in the opinion. He discovered that he could not work as he had been directed to with the other machines, and returned to bench work, when Allen came to him and told him to go back to work on the machine. Schoules, who was passing by, thereupon instructed him in a new way to work, adapted to the machine with the new appliance, but did not warn him in any way of the dangers attending cleaning the machine with the licker-in on it. The licker-in was wrapped in paper and the plaintiff could not see that it had teeth. He had seen no such appliances around the mill.

The plaintiff also testified that he did not know a man named Leigh, never had worked for him to his knowledge, never was told that he was going to work for him or that he was going to work for any one except the defendant, and that he had no knowledge of any kind that he was in any one else's employment. It was admitted that the defendant paid the plaintiff's wages. Allen, though present at the trial and sworn as a witness for the defendant, was not called to testify. The deposition of Schoules was read in which he stated that he had warned the plaintiff to keep his stick off the licker-in.

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At the close of the evidence, the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

Other facts are stated in the opinion.

C. R. Cummings, for the plaintiff.

R. P. Borden, for the defendant.

MORTON, J. At the close of the evidence a verdict was directed for the defendant on its motion, and the plaintiff excepted. The question is whether there was any evidence warranting a verdict for the plaintiff. We think that there was.

The plaintiff was hired to work as a laborer for the defendant by one Allen, whose sole or principal duty, it could have been found, was that of superintendence. Allen set the plaintiff to work at first at cleaning pieces of machinery, and about a week later set him to work at clearing the cylinders of cards which were being set up in the mill by one Leigh under a contract between him and the defendant. This contract bound the defendant to furnish "usual laborer's assistance" in fitting up the cards. But there was nothing to show that the plaintiff knew, or at least the evidence would have warranted a finding that he did not know, that he was working for any one except the defendant and had never consented or contracted to work for Leigh. It is possible, perhaps, that his consent could have been implied from the nature of the work which he was hired by the defendant to do. But the question whether he was at the time of the accident in the employment of the defendant or of Leigh was one of fact to be determined by the jury upon all of the evidence. In order to constitute the plaintiff the servant of Leigh, there must have been such a change in his relations to the defendant that the defendant had ceased for the time being to have any direction over or control of him, and Leigh had become responsible for the discharge of those duties which a master owes to his servant in respect to matters affecting his safety. *Driscoll* v. *Towle*, 181 Mass. 416. *Coughlan* v. *Cambridge*, 166 Mass. 268. There was nothing in the contract between the defendant and Leigh necessarily inconsistent with the plaintiff's continuing in the defendant's employment. The defendant was to furnish laborers to assist Leigh in setting up the cards, but there was nothing in that arrangement which necessarily operated to transfer the laborers so furnished from the employment of the defendant to that of

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Leigh while they were so engaged. As already observed, the question, in whose employment the plaintiff was at the time of the accident, was one of fact for the jury.

There was also evidence, we think, warranting a finding of due care on the part of the plaintiff and of negligence on the part of the defendant in failing to warn or instruct him of the danger when he was set to work on the card on which he was injured. That card differed from the cards on which he had been working in having the "licker-in," as it is termed, in position. This was a small cylinder covered with teeth and revolving in an opposite direction from that in which the main cylinder revolved, and was from one to two inches from the main cylinder. The cylinder had to be cleaned while in motion, and the method of cleaning it with the "licker-in" in position was different from that of cleaning it when the "licker-in" was not in position. The cylinder when in motion revolved towards the plaintiff. The "licker-in" was covered with paper and the plaintiff testified that he did not know what it was. In attempting to clean the cylinder as he had been instructed to do, the stick which the plaintiff was using slipped, and his hand went down between the "licker-in" and the cylinder, setting the "licker-in" in motion, causing the injuries complained of.

There was evidence tending to show that the plaintiff was cleaning the cylinder in the manner in which he had been told to clean it, so far as any instruction at all had been given to him, and we do not see, therefore, how it could be ruled as matter of law that he was not in the exercise of due care. Nor do we see how it could be said as matter of law that he assumed the risk. According to his testimony he did not know or appreciate the danger, and, unless he did, he could not be said to have assumed it. How much weight his testimony was entitled to was, of course, for the jury to say. And it was also, we think, for the jury to say whether, taking all of the circumstances into account, the risk was an obvious one. Whether the risk was an obvious one would depend largely, it seems to us, on the degree of credibility to which, in the opinion of a jury, the plaintiff's statements in regard to his knowledge or ignorance respecting the "licker-in" might be entitled. If he knew what a "licker-in" was and how it operated, and that there was one in position on the card

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on which he was working, then, we think, that the risk that, if the stick slipped, his hand might go down between the "licker-in" and the revolving cylinder was an obvious one. But, if he did not know these things, then we do not see how it could be said that the risk was an obvious one.

The remaining question relates to the defendant's negligence. There was testimony tending to show that, when Allen set the plaintiff to work on the card on which he was injured, he gave him no warning or instructions as to the manner of doing the work or as to the danger. The only instructions which were or had been given to the plaintiff as to the machine on which he was injured were given to him by one Schoules, who, the testimony tended to show, was in the employ of Leigh, but to whom, the testimony also tended to show, Allen had delegated the duty of instruction, and who thereby became, for that purpose, the servant of the defendant. The questions whether any instructions were needed, and, if so, whether those which were or had been given were sufficient, were for the jury and should have been submitted to them.

Exceptions sustained.

PALSQUALE LANCI, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 11, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Street railway, Causing death, Gross.

At the trial of an action against a street railway company under R. L. c. 111, § 267, to recover for the death of a woman which was alleged to have been caused, while she was a passenger on a car of the defendant in an evening in early October, by reason of gross negligence on the part of the conductor of the car, there was evidence which tended to show that the plaintiff's intestate, just before the accident, was sitting in a closed car near the front door, that there were not more than fourteen other passengers, that, after she and two others had signalled for the car to stop, she remained in her seat until it came to a full stop, when, the other passengers leaving by the rear door, she, with bundles in her hands, pushed the front door open with her shoulder, passed out on to the front platform and was getting off the car when the conductor gave the starting signal, the car started and she was thrown, receiving injuries from which she

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afterwards died. The conductor all the time was at his place at the rear door. *Held*, that there was nothing to show such knowledge on the part of the conductor of the movements of the plaintiff's intestate, or such failure on his part to perform his ordinary duties under the circumstances as to indicate the gross negligence which, by R. L. c. 111, § 267, is made essential to the maintenance of the action.

TORT under R. L. c. 111, § 267, by the administrator of Mary Fama, whose death was alleged to have been caused while she was a passenger of the defendant by reason of gross negligence of the defendant's servants. Writ in the Superior Court for the county of Suffolk dated May 20, 1903.

There was a trial before *Bell*, J., who, at the close of the evidence, directed a verdict for the defendant, and the plaintiff excepted. The facts are stated in the opinion.

D. E. Hall, (*R. W. Dunbar* with him,) for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

KNOWLTON, C. J. The plaintiff's intestate, a woman about forty years of age, stepped from the forward end of one of the defendant's cars while it was in motion, fell and was killed. The only question in the case is whether there was any evidence that the accident was caused by the gross negligence of the defendant's servants.

The accident happened on Tremont Street in Boston, between Whittier Street and Vernon Street, in the evening of October 8, 1902. The vehicle was an ordinary closed car, containing at the time not more than fifteen passengers. The plaintiff's intestate sat on the right hand side, in the forward part of the car, not far from the door. The plaintiff and the defendant presented different accounts and different theories of the way in which the accident happened. The testimony of the defendant's witnesses tended to show that the car did not stop at Whittier Street, and that the intestate arose, as if desiring to alight, when the conductor gave one stroke of the bell to stop the car at the next crossing, which was at Vernon Street; that the woman, without stopping, passed quickly out at the forward door and stepped off the car, and that the conductor, as he saw her about to do this, gave three strokes of the bell to stop the car quickly, whereupon it was stopped immediately, leaving the middle of the car nearly opposite the place where the woman fell. The

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defendant's theory that she got off in this way was supported by most of the witnesses, and the great weight of the evidence. If the accident happened in this way there was nothing to show negligence on the part of the defendant's servants.

The plaintiff introduced a witness who testified that he sat on the left hand side of the car, very near the forward door; that the woman had two bundles in her hands, and sat on the opposite side, with no one between her and the door; that, before the car reached Whittier Street, she and two other passengers each gave a signal to the conductor to stop at Whittier Street; that she remained in her seat until the car came to a full stop, and then went to the forward door which stood part way open, and pushed her shoulder against it and slid it entirely open, and went out and stepped off the car at the right hand side; that while she was stepping off the conductor gave two bells to start the car, and the car started and caused her to fall. He testified, and it was undisputed, that there was a man standing near the motorman, on his left. There was corroboration of a part of the testimony of this witness by another witness who said that he thought the car stopped at Whittier Street before the plaintiff's intestate got off, but was not certain of it. The only other evidence in regard to the motorman was that he was looking straight forward, and it is not contended that he was grossly negligent. On the testimony of the witness relied on by the plaintiff, when the car stopped at Whittier Street passengers got off at the rear door, not more than three or four in number, perhaps not more than one or two. All the evidence tended to show that the conductor was in his place at the rear of the car.

The plaintiff's contention is that the jury might have found the conductor grossly negligent in not knowing that the plaintiff's intestate was leaving the car at the front door while the car was standing at Whittier Street, and in starting the car before she got off.

If there were three persons who gave signals to stop the car at that street, of whom the intestate was the farthest from the conductor, the conductor could not be found guilty of negligence if he stopped the car on the signal of one of the others, without noticing her signal, and without knowing that she wished to alight. While, upon the defendant's theory of the accident, with

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the passengers all sitting in their seats, there was nothing to obstruct his view of the intestate when she went out of the car, upon the plaintiff's theory there were other passengers making their way through the car, and alighting at its rear end, whose presence would interfere with his view of the forward door. He would naturally be observing the movements of the passengers passing out at the rear, to see when they had all completed their exit. In the evening, when the way to the rear door was open and there were but few passengers in the car, of whom two or three or four were passing out at the rear end, he would not naturally expect that a woman would go out alone at the forward door, and a jury would not be warranted in finding that he was grossly negligent, if they properly could find that he was negligent at all, in failing to notice that this woman stepped out at that door while the others were passing out towards the rear, and that she was on the platform in front after the others had alighted. Upon the testimony of the plaintiff's witness there was nothing to show such knowledge on the part of the conductor, or such failure to perform the ordinary duties of a conductor under such circumstances, as to indicate gross negligence on his part.

The statute on which the plaintiff relies (R. L. c. 111, § 267) recognizes a difference between gross negligence and a mere want of ordinary care. This distinction cannot be disregarded by the courts. *Brennan* v. *Standard Oil Co.* 187 Mass. 376. *Caswell* v. *Boston Elevated Railway*, 190 Mass. 527. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77, 79. While the gross negligence referred to in this statute does not necessarily include the wanton, reckless or wilful misconduct which may be the foundation of a criminal prosecution for a wrong inflicted through gross negligence, or of a suit for damages by a trespasser, or by one who was not in the exercise of ordinary care in reference to the conditions which led up to the injury, (see *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130, 134, and *Banks* v. *Braman*, 188 Mass. 367,) it is something more than the mere lack of ordinary care.

Exceptions overruled.

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WILLIAM J. SCHLATTER & another *vs.* CHARLES L. YOUNG.

Hampden. November 12, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Mortgage, Of personal property. *Practice, Civil*, Rulings.

A mortgage of a greenhouse, including the plants then in it and after acquired property and giving the mortgagor the right to sell flowers and plants in the ordinary course of trade, where the mortgagee never has taken possession of the plants acquired after the delivery of the mortgage, gives him no title to such plants which can pass to a purchaser at a foreclosure sale under the mortgage.

It is proper for a judge before whom a case is tried without a jury to refuse requests for rulings of law based on testimony which he is not bound to believe, especially if he does not believe it.

CONTRACT upon an account annexed for coal alleged to have been sold to the defendant and delivered at a greenhouse on Hickory Street in Springfield owned by him, and for some small additional items. Writ in the Police Court of Springfield dated December 5, 1905.

On appeal to the Superior Court the case was tried before *Fessenden*, J., without a jury. The character of the evidence is described in the opinion.

It was agreed that all items of debit and credit in the plaintiffs' account previous to January 7, 1904, should be stricken out, and that the items of coal in the account so amended were delivered at the greenhouse on Hickory Street.

The plaintiff asked the judge to find, as facts, as follows:

1. That the defendant became the owner of the greenhouse on Hickory Street, in the city of Springfield, and all the contents covered by mortgage, on January 7, 1904, and remained the owner until March 1, 1904.

2. That coal to the amount of $109.72 was delivered by the plaintiffs at the greenhouse owned by the defendant between January 7, 1904, and March 1, 1904.

3. That the coal was so delivered by and with the knowledge and consent of the defendant.

4. That Buckleton was in charge of the defendant's green-

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house on Hickory Street during the period of the defendant's ownership.

5. That the other items in the plaintiffs' account were furnished by the plaintiffs at the request of Buckleton by the defendant's authority.

6. That the defendant received and accepted a substantial benefit from and as a result of the acts of the plaintiffs.

7. That the plaintiffs are entitled to recover.

The judge found as requested as to paragraphs 1 and 2 and refused to find as requested as to paragraph 3, substituting the following: "That the coal was so delivered by and with the consent of the defendant." He refused to find as requested as to paragraph 4, but found as follows: "That Buckleton was in the defendant's greenhouse on Hickory Street during the period of the defendant's ownership with the defendant's consent. He refused to find as requested as to paragraphs 5, 6 and 7."

The plaintiff also asked the judge to rule, as matters of law, as follows:

1. That the plaintiffs are not estopped to recover from the defendant by reason of their attempt to get evidence of indebtedness from Buckleton, or by their attempts to recover from any other person or persons.

2. That the plaintiffs are not estopped to recover from the defendant by the manner and form of keeping the account in the plaintiffs' books.

3. That the defendant is indebted to the plaintiffs in the amount of the items of the plaintiffs' account which the plaintiffs furnished with the knowledge and consent of the defendant, and from which the defendant derived any benefit.

4. That Buckleton was the agent of the defendant in conducting the business of the greenhouse.

5. That the plaintiffs are entitled to recover on the evidence.

The judge ruled as requested in paragraphs 1 and 2, and refused to rule as requested in paragraphs 3, 4 and 5.

The judge found for the defendant; and the plaintiffs alleged exceptions.

The case was submitted on briefs.

H. A. Buzzell & C. S. Ballard, for the plaintiffs.

J. L. Doherty & W. G. Brownson, for the defendant.

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RUGG, J. This is an action of contract. Exceptions were taken before a judge of the Superior Court sitting without a jury. The plaintiffs' declaration was upon an account annexed. Most of the items were for coal delivered at a certain greenhouse of which the defendant was the owner. It is not asserted that the defendant was personally at the greenhouse during the time when the coal was delivered, one Buckleton being in actual possession and control. The points in controversy at the trial were whether the defendant had ordered the coal, whether Buckleton was acting as the agent for the defendant in ordering it and conducting the business of florist and whether the defendant received and accepted any substantial benefit from the acts of the plaintiffs. There was conflicting evidence upon all these points. The judge found, in accordance with requests of the plaintiffs, that the defendant was the owner of the greenhouse and whatever of its contents was covered by a certain mortgage, by the foreclosure of which the defendant acquired title. This mortgage was dated May 29, 1901, and was foreclosed by sale at public auction on January 7, 1907. No request was presented nor finding made as to the title to the plants in the greenhouse at the time of the delivery of the coal. Although the mortgage covered the plants then in the greenhouse and future acquired property, it also contained a reservation to the mortgagor of the right to sell flowers and plants in the ordinary course of trade, and there was no evidence that the mortgagee ever took possession under his mortgage of the property acquired after its delivery. It was necessary for him to do this at least in order that title to such property might pass to a purchaser at the foreclosure sale. *Wasserman* v. *McDonnell*, 190 Mass. 326. There was no evidence as to whether any of the plants included in the mortgage remained at the time of the sale, but there was plenary evidence that flowers and plants had been sold since the date of the mortgage. There was no testimony contradicting that given by two witnesses, that no plants were included in the foreclosure sale. It was therefore impossible to make the finding of fact or ruling of law requested by the plaintiffs that the defendant accepted or received benefit from the acts of the defendant, and was indebted for the items of the plaintiffs' account. Even if all the contents of the greenhouse

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had been owned by the defendant, it would not follow as matter of law that he would be bound to pay for coal ordered by one in possession, not as his agent, but in some independent capacity. Upon all the other matters of fact as to which rulings were requested there was abundant evidence warranting findings by the judge adverse to the contentions of the plaintiffs, and such findings cannot be disturbed. *Bailey* v. *Marden*, 193 Mass. 277. The requests which the plaintiff styled "as matters of law," were based upon aspects of the evidence, which the judge was not bound to believe, and obviously did not believe. Therefore they were properly refused.

Exceptions overruled.

BLANCHE M. POWERS *vs.* JOSEPH L. BERGMAN.

Suffolk. November 13, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Assault. Practice, Civil, Specification of time.

In an action for an assault and battery the plaintiff filed a specification stating that the assault was committed "on or about" a day named. The plaintiff introduced evidence tending to show that the assault was committed on the day named. The jury disagreed, and there was a new trial, at which after the plaintiff's opening the defendant moved that the words "or about" should be stricken out of the specification filed by the plaintiff, and the judge, subject to the plaintiff's exception, ordered that the words be stricken out. The plaintiff then made motions to amend her specifications in relation to the date in accordance with her understanding of the facts. These motions were denied by the judge. The plaintiff offered evidence to prove her case in all particulars except as to the date named in the specification and said that she could not prove that the assault was committed on that day. Thereupon the judge ordered a verdict for the defendant, and the plaintiff excepted. *Held*, that the order requiring the striking out of the words "or about" from the specifications was erroneous, and, with the denial of the plaintiff's motions to amend her specification, was equivalent to an order forbidding her from presenting the case relied upon and stated in her declaration and in the specification first filed, which, if her case was prosecuted honestly and in good faith, was a denial of justice and was not within the power of the court.

At the second trial of an action for an assault the plaintiff is not estopped by the fact, that her evidence at the first trial tended to show that the assault was com-

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mitted on a certain day, from showing at the second trial, under a proper specification of time, that the witnesses at the first trial were mistaken in that part of their testimony and that the assault was committed on a different day.

KNOWLTON, C. J. This is an action of tort for an assault and battery. The declaration does not state the time and place of the assault. The defendant moved that the plaintiff file specifications in these particulars. Less than two weeks afterwards, without any order of court on the motion, the plaintiff filed a specification as follows: "And the plaintiff says that the assault declared on by the plaintiff occurred at Boston in the County of Suffolk aforesaid, on or about Friday, November 29, 1901." The defendant's answer was a general denial. On these pleadings the parties went to trial in October, 1904, and the jury disagreed. At a second trial, which began on October 10, 1906, at the close of the plaintiff's opening the defendant moved that the words "or about" be stricken out of the specification filed by the plaintiff. The plaintiff objected to the allowance of the motion on various grounds, one of which was that he "did not rely on proving the act as of November 29, 1901, but expected to prove that it occurred on another date." The motion was allowed and the plaintiff excepted.

A motion of the plaintiff, made nearly a year before, to amend her specification by stating the time of the assault as between November 6 and December 6, 1901, had been denied by another judge. After the allowance of the motion to strike out the words "or about," the plaintiff made, in succession, different motions to amend the specifications, one by stating the act as having occurred between November 11 and November 27, 1901, another by fixing the time as between November 15 and November 27, 1901, excluding Saturdays and Sundays, and another as either on Friday, November 22, 1901, or Friday, November 29, 1901, and another on Friday, November 22, 1901. Each of these motions was denied on hearing, and to the order upon each the plaintiff excepted.

The plaintiff offered evidence to prove her case in all particulars except as to the date November 29, 1901, and said that she could not prove that the assault was committed on that day. Thereupon a verdict for the defendant was ordered, and the plaintiff excepted.

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When the averments of a declaration are too general to give the defendant reasonable information of the particular facts on which the plaintiff relies as a part of his general statement of a cause of action, specifications are ordered on the defendant's motion. Sometimes it is difficult or impossible for the plaintiff to state the time or place with exactness, and it becomes a question for the exercise of judicial discretion to determine how far he should be required to go in narrowing the statement of his case, for the protection or convenience of the defendant. The rights and interests of the parties and the difficulties and exigencies of the preparation of the plaintiff's case and of the defendant's defence are to be considered, and such orders are to be made as will promote justice. *Blaisdell* v. *Gladwin*, 4 Cush. 373, 376. *Commonwealth* v. *Snelling*, 15 Pick. 321, 331, 333. *Wheelock* v. *Barney*, 27 Ind. 462. *Mosheim* v. *Pawn*, 18 N. Y. Supp. 166. The specifications under which this case was first tried and the second trial was begun did not limit the plaintiff to a single day in her proof of the time of the assault, but permitted proof of an act committed on November 29, or on some other day about that time. *District Township of Sidney* v. *Des Moines Ins. Co.* 75 Iowa, 647. If the defendant needed a more definite specification, he might move for an order requiring it, and if the judge thought the motion reasonable he might allow it. Instead of this, he made a motion that the plaintiff's specification previously filed should be changed to a specification of a time designated by himself, which the plaintiff said was inconsistent with the facts of the case that she desired to present. The plaintiff was not permitted to file a more definite specification according to her understanding of the facts, but the defendant was permitted to make a specification for her, which she said was incorrect. This was equivalent to an order forbidding the plaintiff to present the case relied upon and stated in her declaration, and in the specification previously filed. If the plaintiff's case was prosecuted honestly and in good faith, this was a denial of justice, and was not within the power of the court. It appeared that, previously to the first trial, the defendant filed a second motion for specifications, which did not suggest a more definite statement of the date on which the alleged assault was committed. Because of a statement to counsel as to what the

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plaintiff expected to prove this motion was not granted. It also appeared that, at the first trial, the plaintiff's evidence tended to show that the alleged wrong was done on November 29. The judge doubtless thought that in the second trial the plaintiff should be limited to the day to which the evidence in the first trial was directed. If the first trial had proceeded under a specification which limited the plaintiff to that day, and the plaintiff had moved to enlarge the specification so that it should include a different time, the court might have exercised its discretion to deny the motion; but to hold that, because the evidence at one trial pointed to a particular time under specifications which included other times, the plaintiff was precluded at a later trial from introducing evidence that witnesses were mistaken in a part of their testimony, and that the time of the event was different, although within the specifications, would introduce an element of estoppel which the law does not recognize and which might work great injustice.

Because of this error the exceptions are sustained. The denials of the plaintiff's several motions, made after this erroneous order, are no longer material, as, in the absence of any further order of the court, the plaintiff, at another trial, will not be limited in her proof to November 29. If a motion is hereafter made for an enlargement of the specifications, the decision upon it will be within the discretion of the court. If a motion is made by the defendant for a more definite and limited specification, in that too the court may exercise discretion. *Commonwealth* v. *Giles*, 1 Gray, 466, 469. *Commonwealth* v. *Wood*, 4 Gray, 11. *Blake* v. *Everett*, 1 Allen, 248. *Harrington* v. *Harrington*, 107 Mass. 329. But it cannot fix for the plaintiff a day which she says is not in accordance with the truth, and not the day shown by the testimony on which she relies.

Exceptions sustained.

J. J. Walsh, (*J. F. Lynch* with him,) for the plaintiff.

C. W. Bartlett & W. B. Sullivan, for the defendant.

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THOMAS F. JORDAN *vs.* NEW ENGLAND STRUCTURAL COMPANY.

ALFRED C. JORDAN *vs.* SAME.

Suffolk. November 13, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Parent and Child.*

In an action under the employers' liability act for personal injuries alleged to have been caused by the negligence of a superintendent of the defendant in failing to warn the plaintiff of the approach of a travelling crane which cut off the ends of two of the plaintiff's fingers while he was standing on a narrow piece of iron and steadying himself by taking hold with one hand of the track of the crane, above a girder which he with another workman had been sent to strengthen by putting a bracket beneath it, it appeared that the fellow workman of the plaintiff went away temporarily and that a superintendent in charge of the work came up to take his place and stood in the same way that the plaintiff did, that the crane came over the track at irregular times, that the plaintiff's back was toward the crane as it approached and that the superintendent was facing it. There was evidence on which it could have been found that it was part of the duty of the superintendent to warn workmen who were in exposed positions of the coming of the crane. There was testimony that he had given such warnings repeatedly during the progress of the work then going on, and also that he could have seen the crane as it was coming. It appeared that the place was very noisy, and that the plaintiff could not hear nor see the approach of the crane while he was working below the girder. *Held,* that the superintendent was not relieved from the obligation to use due care for the safety of the employees by temporarily taking the place of the plaintiff's fellow workman to assist in putting up the bracket, and that it was a question for the jury whether the superintendent was negligent in failing to discover the approach of the crane and to warn the plaintiff of his danger; *also* that it was a question for the jury whether the plaintiff was in the exercise of due care.

At common law an employee has no remedy for an injury caused by the negligence of a superintendent of his employer who is his fellow servant.

The employers' liability act gives no remedy to a father for expenses for medical attendance incurred by reason of injuries to his minor son for which the employer is liable to the son under the act.

TWO ACTIONS OF TORT, both brought under the employers' liability act as stated in the first paragraph of the opinion. Writs dated respectively December 31, 1904, and January 18, 1905.

In the Superior Court the cases were tried together before *Richardson,* J. The evidence is described in the opinion. At

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the close of the evidence the defendant asked the judge to rule, apparently in both cases, as follows:

First. Upon all the evidence the plaintiff is not entitled to recover.

Second. Upon all the evidence the plaintiff has not sustained the burden of proof to show that Flynn was a superintendent within the meaning of the employers' liability act.

Third. Upon all the evidence Flynn was acting as an ordinary employee at the time of the accident and not as a superintendent within the meaning of the act.

Fourth. Under all the circumstances of this case there was no duty on the part of Flynn to warn the plaintiff [in the first case] about any possible movement of the crane.

Fifth. Upon all the evidence there was no failure to warn the plaintiff [in the first case] on the part of Flynn while acting as a superintendent.

Sixth. Upon all the evidence the plaintiff [in the first case] was not in the exercise of due care.

Seventh. Upon all the evidence the plaintiff [in the first case] assumed the risk as a matter of law.

The judge refused to make any of these rulings and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of $3,000 and a verdict for the plaintiff in the second case in the sum of $300. The defendant alleged exceptions.

W. H. Hitchcock (*G. A. Drury* with him,) for the defendant.

S. R. Jones, for the plaintiffs.

KNOWLTON, C. J. These two cases were brought under the employers' liability act, the first by a minor, to recover damages for personal injuries received through the negligence of the defendant's superintendent, and the second by the minor's father, to recover for loss of services of the son, and for the expenses of his medical attendance rendered necessary by the accident.

In the defendant's shop there was a large crane, estimated to weigh about twenty tons, which passed in and out upon an iron track nearly twenty feet above the ground, which track was supported by girders. The track and girders were taken down and replaced by new ones. While the work was going on and before the old track was entirely removed, the crane ran in and

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out over that part which was in position, and as soon as the new track was in place and safely supported it began to run in and out occasionally over that. The minor plaintiff was an iron worker. He was sent with another man to put a bracket underneath the girder, between the pillars that supported it, and in doing the work he stood upon a narrow piece of iron and steadied himself by taking hold of the track above the girder with one hand. His companion went away temporarily, and one Flynn, a foreman who directed the work, came up to take his place, standing in a similar way, with one of his hands holding the rail of the track. The crane came along over the track and cut off the ends of two of the plaintiff's fingers.

There was ample evidence to warrant a finding that Flynn was a superintendent within the meaning of the statute. The jury well might find that it was a part of his duty to warn workmen, who were in exposed positions, of the coming of the crane, if they were where they would not be likely to see it. There was testimony that he had given such warnings repeatedly during the progress of the work. It appeared that the place was very noisy, and that the plaintiff could not hear nor see the approach of the crane while he was working below the girder. His back was toward the crane as it approached, while the superintendent was facing it. There was testimony that the superintendent could have seen the crane as it was coming, although this was disputed. The superintendent was not relieved from the obligation to use due care for the safety of the employees by his taking the place of the plaintiff's companion, temporarily, to assist in the work of putting in the bracket. It was a question for the jury whether the superintendent was negligent in failing to discover the approach of the crane and to warn the plaintiff of his danger. It was also a question for the jury whether the plaintiff was in the exercise of due care. In this case the defendant's exceptions must be overruled.

The case of the father presents a different question. This, like the other, is brought under the employers' liability act, and no negligence is charged except that of the superintendent. At common law neither of the plaintiffs could recover, as the only negligence complained of was that of a fellow servant. The employers' liability act cannot be availed of by the father to recover

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for loss of service or for expenses, inasmuch as this statute gives a right of action only to the employee or his legal representatives, or, if he is instantly killed or dies without conscious suffering, to his widow or next of kin. R. L. c. 106, §§ 71, 73. "The employee or his legal representatives shall . . . have the same rights to compensation and of action against the employer as if he had not been an employee," etc. If he is a minor, this enlargement of his rights at common law does not extend to his father, suing in his own right.

The same construction is put upon the statute giving damages to persons injured by defects in highways, existing through the negligence of cities and towns. *Harwood* v. *Lowell*, 4 Cush. 310. *Nestor* v. *Fall River*, 183 Mass. 265.

It has also been given to a similar employers' liability act by the Supreme Court of Alabama. *Lovell* v. *DeBardelaben Coal & Iron Co.* 90 Ala. 13. *Woodward Iron Co.* v. *Cook*, 124 Ala. 349. In this action the exceptions must be sustained.

Ordered accordingly.

CELIA SOEBEL *vs.* BOSTON ELEVATED RAILWAY COMPANY.
ABRAM SOEBEL *vs.* SAME.

Suffolk. November 14, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & PUGG, JJ.

Evidence, Presumptions and burden of proof. *Practice, Civil*, Judge's charge, New trial. *Evidence*, Hearsay in preliminary affidavit. *Rules of Court.*

In a civil case the presiding judge in explaining the term "burden of proof" told the jury that they could not find in accordance with a particular contention unless it was "proved that it was so," and added "by proved that it was so I mean a balance of proof in favor of the theory. . . . The plaintiff must make his side heavier, stronger in favor of the proposition to your minds, than that of the defendant, because if your minds remain balanced you will have to give a verdict for the defendant." In another place he said "such damages as are proved by a fair preponderance of the evidence she is entitled to recover for, and those which she has not so proved she is not entitled to recover for." *Held*, that from these instructions the jury must have understood the law upon the subject correctly, although the judge made further explanations which were not so clear.

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On an application for a new trial on the ground of newly discovered evidence, affidavits under Rule 31 of the Superior Court setting forth what a person other than the affiants has said showing his knowledge of important facts which were not known to the applicant at the time of the trial, should not be rejected because based on hearsay, if the affidavit of the witness who knows the facts cannot be obtained, and should be received and considered by the trial judge to whom the application is made, it being for him to say how much weight should be given to them.

TWO ACTIONS OF TORT, the first by Celia Soebel for personal injuries alleged to have been received by her on June 12, 1901, from the alleged negligence of the servants of the defendant in starting an open electric car from which she was alighting as a passenger, and the second by Abram Soebel, the husband of the plaintiff in the first case, for damages from his loss of her services and the expense of attendance and medicines incurred by reason of her injuries. Writs dated June 3, 1903.

In the Superior Court the cases were consolidated and were tried together before *Bell*, J. On the question of liability the defendant admitted that if the plaintiff's story was true the defendant was liable, and the question was whether the witnesses of the plaintiff or those of the defendant were to be believed. The evidence at the trial related largely to the issue of the nature and extent of the injuries of the plaintiff in the first case. The plaintiffs' contention was that two days after the accident the plaintiff Celia as a result of it had a miscarriage from the consequences of which she never had recovered.

The jury returned a verdict for the plaintiff in the first case in the sum of $9,375 and for the plaintiff in the second case in the sum of $1,533. The defendant alleged exceptions to certain portions of the charge of the judge, of which only those relating to the burden of proof were argued.

Within three days after the verdicts the defendant filed a motion for a new trial, on the ground that the verdicts were against the law and against the evidence, and the weight of the evidence, and were excessive. Shortly after the filing of this motion the defendant filed another motion for a new trial in each case, supported by affidavits, based upon newly discovered evidence. The newly discovered evidence consisted partly of affidavits of new witnesses to the accident itself, tending to support the defence on liability, partly of a record of the conviction and sen-

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tence to imprisonment of one of the plaintiffs' witnesses for maintaining a liquor nuisance, but principally of an affidavit of one Theresa Agnes Coughlin, to the effect that in the summer of 1900 the plaintiff Celia, being pregnant, had had an abortion performed by one Ida L. Mason and a doctor who was called in for the purpose, while the affiant was waiting in an anteroom, and that afterwards the affiant went into the room where the abortion had been performed and found the plaintiff Celia lying there and noticed certain bloody instruments, and that the plaintiff Celia then described the operation to her. The affidavit also contained the statement that during the trial of these cases both the plaintiffs called upon the affiant at her place of business, and requested her not to give any information to the defendant's investigators if they should call upon her, but to say to them, if asked, that before the accident the plaintiff Celia was strong and healthy. In support of this affidavit the defendant also filed two other affidavits, one by Michael J. Kelley, a former police inspector of the city of Boston, and the other by John Addison Patron, an employee in the defendant's claim department. The material portion for the present purpose of these affidavits was that the affiant Kelley had formerly been acquainted with Ida L. Mason in connection with his official duties in the city of Boston, and that he knew that she had been at the time of the alleged abortion an attendant or assistant in the office of "Mrs. Dr. Bishop," who was then a notorious abortionist in the city of Boston; that both the affiants Kelley and Patron on June 26, 1905, visited the place of business of Mason in the city of Providence, Rhode Island, and showed her a photograph of the plaintiff Celia, which she said looked familiar; that on June 29 they again both visited Mason in Providence, taking with them the original affidavit of Theresa Agnes Coughlin, which they read to her and which she said was true; that she then also said that she remembered the plaintiff Celia well, and remembered her being nervous and dropping a glass of water and saying something in a foreign language at the time of the abortion; but that she refused to make an affidavit that the abortion had been performed, unless she was paid the sum of $5,000 so that she might leave this country and stay away for a long time, which proposition Kelley and Patron declined to entertain. The affidavit of

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Patron contained the further statement that Mason at the second of the conversations asked him to report to the defendant the terms upon which she would make an affidavit to these facts, to wit, the payment of $5,000.

At the argument upon the motions the plaintiffs, besides other objections to the affidavits, objected to the affidavits of Kelley and Patron and asked to have them excluded from consideration on the ground that they were chiefly hearsay.

The judge, after consideration, granted a new trial in the case of Celia Soebel, unless the plaintiff before May 1, 1906, remitted the sum of $3,375 , and ordered that if such remittance was filed judgment should be entered in the sum of $6,000. He granted a new trial in the case of Abram Soebel unless the plaintiff before May 1, 1906, remitted the sum of $500, and ordered that if such remittance was filed judgment should be entered in the sum of $1,000.

The judge filed a memorandum of his decision in which, among other things, he said, in regard to the plaintiff's objections to the affidavits filed by the defendant, "The statements in many of them are hearsay. This is also true of many of the plaintiff's affidavits. I decline to receive or consider hearsay statements on either side." The judge refused to hear oral evidence upon the motions. He found that the defendant was not chargeable with want of diligence in procuring the testimony disclosed in its affidavits.

The defendant alleged supplementary exceptions to the ruling "I decline to receive or consider hearsay statements on either side," so far as it applied to the affidavits of Patron and Kelley and to the exclusion of those affidavits, "which ruling was made as a matter of law and not of discretion." It was agreed that Rule 31 of the Superior Court as well as the other rules of that court in force at the time of the argument of the motions, on December 9, 1905, might be referred to.

W. G. Thompson, (*S. H. E. Freund* with him,) for the defendant.

W. A. Buie, (*J. F. Cusick* with him,) for the plaintiffs.

KNOWLTON, C. J. The defendant has filed two bills of exceptions, one founded on instructions to the jury at the trial, and the other on a ruling of the judge at a hearing of certain motions

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of the defendant for a new trial. The only question argued upon the first bill relates to the judge's instructions upon the burden of proof. The instructions on this point were quite full, given in part in the original charge, and in part after a question had been raised at its close by the defendant's counsel. In explaining the term "burden of proof," the judge said that the jury could not find in accordance with a particular contention, unless it was "proved that it was so." He added: "By proved that it was so I mean a balance of proof in favor of that theory. . . . The plaintiff must make his side heavier, stronger, in favor of the proposition, to your minds, than that of the defendant, because if your minds remain balanced, you will have to give a verdict for the defendant." In another place he said, "Such damages as are proved by a fair preponderance of the evidence she is entitled to recover for, and those which she has not so proved she is not entitled to recover for." There was considerable of explanation and elaboration, some of which, taken alone, was not expressed in the most felicitous terms; but we think the jury must have understood the law on this subject, the general statement of which was correct. The use of the word "probable" in different parts of these instructions was not such as to call for a new trial under the criticism of the charge contained in *Haskins* v. *Haskins*, 9 Gray, 390. These exceptions must be overruled.

One of the two motions for a new trial was on the ground of newly discovered evidence. In support of this motion affidavits of different witnesses were filed, setting forth what other persons had said, showing their knowledge of important facts which were not known to the defendant and were not introduced at the trial. One of these persons, from whom very important statements were presented in this way, was out of the State, and it appeared that an affidavit could not be obtained from her. At the hearing the plaintiffs requested that these affidavits be excluded from consideration. In his memorandum accompanying the statement of his decision not to grant the motion, the judge said, "I decline to receive or consider hearsay statements on either side." The defendant excepted to this as a ruling, and its bill of exceptions, which was allowed by the judge, contains this statement: "which ruling was made as a matter of law and not

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of discretion." We understand, therefore, that, in dealing with these motions, the judge ruled as matter of law that he could not receive or consider any affidavits, so far as they were statements of hearsay. He also refused to hear oral testimony upon the motions. He found that the defendant was not chargeable with want of diligence in procuring the testimony disclosed in its affidavits. We therefore must consider the question whether, at a hearing upon a motion for a new trial on the ground of newly discovered evidence, the moving party is precluded, under all circumstances, from using any affidavits to show the existence of such evidence, other than those of the witnesses themselves who would give the testimony if the new trial was granted.

It is to be noticed at the outset that the primary question before the judge in such a case is not what the truth is, as to the matter to which the newly discovered evidence is directed, but whether there is such evidence. A secondary question is whether it is reliable and important. As a practical consideration we all know that persons who can give important testimony often will not volunteer it, and sometimes decline to give it in any form unless they are forced to. They cannot be compelled to make affidavits, and often the only practicable way of informing a court of the existence of such evidence is by an affidavit of some one to whom they have made oral disclosures. Where the judge declines to hear oral testimony upon the motion, and especially where, as in this case, the witness is out of the Commonwealth and declines to make an affidavit, the only practicable way of presenting the fact as to such evidence is by an affidavit which is in part hearsay.

Under Rule 31 of the Superior Court, as construed in *Borley* v. *Allison*, 181 Mass. 246, a hearing cannot be obtained on such a motion without a verification of it by affidavit. For such a purpose, an affidavit of the party that he has discovered the evidence, setting forth what it is, and that a credible witness says he has knowledge of the facts as set forth, ought to be enough, if it is shown that the affidavits of the witnesses who know the facts cannot be obtained with reasonable effort. Courts often have refused to grant new trials upon affidavits of what persons have told the affiant about the facts, on the ground that they did not show that the evidence would be of sufficient importance

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to warrant an order for a new trial. *Sheppard* v. *Sheppard*, 5 Halst. 250, 254. *Jenny Lind Co.* v. *Bowyer & Co.* 11 Cal. 194, 199. *Shumway* v. *Fowler*, 4 Johns. 425. *Cardell* v. *Lawton*, 16 Vt. 606. *Atkinson* v. *Saltsman*, 3 Ind. App. 139. But the better doctrine is that, while the party ought not to be permitted to prevail unless he furnishes the most convincing evidence that he can readily command, affidavits founded on hearsay should be received on a question of this kind if no better ones can be obtained. *Dunbar* v. *Hollinshead*, 10 Wis. 505, 508, 509. *Smith* v. *Cushing*, 18 Wis. 295. *McLeod* v. *Shelly Manuf. Co.* 108 Ala. 81, 88. *Reed* v. *Staton*, 3 Hayw. (Tenn.) 159, 164. *White* v. *Wallen*, 17 Ga. 106. Upon the hearing of a motion under this rule of the court, an affidavit of the witness himself, who knows the facts, should be presented if possible. But if the affidavit of what the witness said about it is to be received as a verification of the statement of the motion, for the purpose of entitling the mover to a hearing, it is illogical to say that it could not be received nor considered upon the hearing itself, when better evidence cannot be obtained, and when the fundamental question is not as to the truth of the new evidence, but as to the existence of it. In *Lansky* v. *West End Street Railway*, 173 Mass. 20, it was decided that an affidavit of hearsay of this kind is competent, not merely as a foundation for a motion for a continuance, but as a ground for action by the court at the hearing. The principle embodied in this case is decisive of the case at bar. *Ex necessitate*, in a case of this kind such affidavits should be received and given such weight as they are entitled to.

This exception must be sustained, and the defendant given a further hearing upon the motion. The relation of the witness to the transaction in which she is said to have taken the principal part, and her statement that she would not give her testimony without the payment of $5,000 may lead the judge to think the evidence of little importance; or, in connection with the other newly discovered evidence, he may think it valuable. This branch of the case is for him alone. But it was his duty to receive and consider the affidavits.

Exceptions sustained.

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SARAH F. STRONG, executrix, *vs.* CARVER COTTON GIN COMPANY.

Suffolk. November 19, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Evidence, Extrinsic affecting writings, Admissions and confessions. *Contract*, Construction, Validity, Implied from conduct. *Patent.*

In an action to recover royalties under a contract in writing granting the defendant a license to manufacture and sell "automatic feed attachments" under a certain patent, which by the plain meaning of its words covers only the manufacture and sale of attachments for which the patent was granted, it cannot be shown by oral evidence that the contract was intended to include automatic feed attachments which were not within the terms of the patent and were not protected by it.

In an action on an agreement to pay royalties to a patentee upon the manufacture and sale of certain machines under his patent, if it appears that the question whether a certain machine manufactured and sold by the defendant was covered by the patent was doubtful and was being litigated, an agreement of the parties either express or shown by their conduct, that the machine was covered by the patent, is competent evidence of that fact.

An agreement to pay a patentee a royalty for a license to manufacture and sell a particular machine, it being uncertain whether it is covered by the patent or not, is binding and will be enforced, although it turns out that the patent is invalid or that the machine is not covered by it, because the agreement is to pay for exemption from disturbance by the patentee and immunity from any claim under his patent.

If a manufacturer has agreed to pay a royalty to a patentee on all machines manufactured and sold by him which are covered by the patent, and subsequently treats a certain machine which he is manufacturing as covered by the patent by making regular returns of his sales of the machines and paying royalties upon them at intervals of six months for four years, also advertising the machines extensively under the patent, and marking them patented, this is equivalent to an agreement that while this practice exists between the parties the machines shall be treated as covered by the patent, but it does not bind the manufacturer to continue the arrangement after he finds out that the patent is not valid or that the machines he is manufacturing are not covered by it.

CONTRACT for damages for the alleged breach of an agreement in writing to pay royalties to the plaintiff dated February 1, 1897. Writ dated September 28, 1904.

The contract sued upon was as follows:

"Memorandum of agreement made and entered into this First day of February, A. D. 1897, by and between Frederick C. Mann,

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and Sarah F. Strong, as Executrix of the will of Frederick S. Strong, both of East Bridgewater in the County of Plymouth and Commonwealth of Massachusetts, parties of the first part, and the Carver Cotton Gin Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and having a usual place of business in East Bridgewater, party of the second part,

"Witnesseth

that Whereas the said parties of the first part are joint owners of Letters Patent of the United States of America, Numbered 503,997, issued Aug. 29, 1893, for the term of seventeen years, said Letters Patent being granted for 'Automatic Feed Attachments,' and

Whereas, the said party of the second part desires a license to manufacture, use and vend and sell to others to use and vend for use in connection with Cotton Seed Linters of its own make, said Automatic Feed Attachments under said Letters Patent, and Whereas, the said parties of the first part are willing to grant such license upon the terms and conditions following,

"Now therefore,

the said party of the second part does hereby for itself and its successors agree with the said Frederick C. Mann, and his executors, administrators and assigns, and with the said Sarah F. Strong and her successors in said trust that, in consideration of the granting of the license as hereinafter set forth, it will pay to said parties of the first part, their representatives, successors or assigns, for each 'Automatic Feed Attachment' made and sold with, and to be used with, a Cotton Seed Linter of its manufacture, the sum of Twelve Dollars, and for each 'Automatic Feed Attachment' made and sold without a Cotton Seed Linter, to be however used in connection with a Cotton Seed Linter of its manufacture, the sum of Ten Dollars, and the said party of the second part does hereby further agree that it will not make or sell any of the 'Automatic Feed Attachments' to be used with any other make of Cotton Seed Linters than its own, or for any other use.

"And the said parties of the first part in consideration of the foregoing do hereby grant to the said party of the second part the exclusive license to make, use and sell, and to vend to others

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to be sold or used with Cotton Seed Linters of the manufacture of said party of the second part said 'Automatic Feed Attachments' for the entire unexpired term for which said Letters Patent were issued.

"And it is hereby mutually agreed and understood that the royalties herein agreed to be paid by said party of the second part to the parties of the first part shall not be due and payable until said party of the second part has received its payment therefor.

"And it is hereby further mutually agreed and understood that payment is to be made by the party of the second part in manner following when payment is due, that is to say: for each 'Automatic Feed Attachment' sold with a Cotton Seed Linter the sum of six dollars to said Frederick C. Mann or his representatives or assigns and to said Sarah F. Strong during her lifetime the sum of six dollars, and in case of her decease during the term of this contract without having assigned the same, to the issue of her son or his representatives; and for each 'Automatic Feed Attachment' sold without a Cotton Seed Linter the sum of Five Dollars to said Frederick C. Mann or his representatives or assigns and to said Sarah F. Strong during her lifetime the sum of Five Dollars, and in case of her decease during the term of this contract without having assigned the same to the issue of her son or his representatives.

"And it is hereby further agreed between said Sarah F. Strong and said party of the second part that in case of her decease during the term of this contract without having assigned the same with royalties accrued but not payable at the time of her decease that when the same become payable under the terms of this contract that said party of the second part will pay the same to her legal representatives.

"And it is hereby further mutually agreed and understood that in case of any violation of the terms of this contract or the conditions of said license by said party of the second part, the said parties of the first part, their representatives or assigns, shall have the right to revoke said license and to grant to others the right to make, use and vend said 'Automatic Feed Attachments' under said Letters Patent for the same purposes for which this license is given after thirty days' notice given in writing.

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"And it is hereby further understood and agreed that said parties of the first part reserve to themselves, their representatives and assigns all rights to make, use and vend to others said 'Automatic Feed Attachment' for other uses than upon Cotton Seed Linters if it shall prove to have value for use in connection with any other sort or kind of machine.

"In witness whereof the parties hereto have hereunto interchangeably set their hands and seals to this and two other copies hereof this day and year first above written.

"Frederick C. Mann,
Sarah F. Strong, Executrix,
Carver Cotton Gin Co.,
By Aaron Hobart,
Treasurer."

The defendant's answer was a general denial. The following stipulations were filed by the parties:

"If it shall be found that the mechanisms which have been manufactured and sold by the defendant are within the terms of the contract sued upon, and that the defendant is liable therefor in this action, the plaintiff shall recover a verdict of $17,840.91, the payment of which sum shall be full payment of all sums, inclusive of interest, due from the defendant to the plaintiff under the contract herein sued upon, up to July 1, 1906.

"1. The defendant is a corporation organized under the laws of the Commonwealth of Massachusetts and having a regular place of business and operating a factory at East Bridgewater, Massachusetts.

"2. The contract between Frederick C. Mann, Sarah F. Strong, Executrix, and the Carver Cotton Gin Company, dated February first, 1897, is the contract of the parties and was executed by the Carver Cotton Gin Company on said date as alleged in the plaintiff's declaration, by its Treasurer, Aaron Hobart, whose authority is admitted for the purpose of this suit.

"3. That the plaintiff Sarah F. Strong and one Frederick C. Mann were at the time of said contract and ever since have been the owners of letters patent No. 503,997, issued August 29, 1893, as set forth in said contract and in the declaration.

"4. That the defendant has paid the plaintiff no royalties

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under said contract dated February 1, 1897, since July first, 1900.

"5. That either party may offer in evidence and use at the trial of this cause printed Patent Office copies of any letters patent with the same force and effect as the original of such letters patent, and that no objection will be made to such form of proof. It is understood, however, that no objections are waived to the materiality of such letters patent or to other matters which might be urged against original or certified copies of said letters patent."

In the Superior Court the case was tried before *Bond*, J.

At the close of the plaintiff's opening, in which the plaintiff stated the substance of the evidence later introduced by the plaintiff and nothing material in addition thereto, the defendant asked the judge to make the two following rulings:

1. That upon the plaintiff's opening no evidence can be presented upon which the plaintiff is entitled to go to the jury, and a verdict should be ordered for the defendant.

2. That in the absence of the patent specified in the contract sued on the pleadings are incomplete and no case is made out upon which the plaintiff is entitled to go to the jury or to proceed; and the court is requested to direct the jury to return a verdict for the defendant.

The judge refused to make either of these rulings and the defendant excepted.

At the close of the evidence and after offers by the defendant of evidence which was excluded by the court, the defendant made twenty requests for rulings, including requests for rulings that upon all the evidence and upon any construction of the contract the plaintiff was not entitled to recover.

The judge refused to make any of the rulings requested, and gave other instructions to the jury, to portions of which the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of $17,840.91, the amount named in the stipulations; and the defendant alleged exceptions.

J. W. Farley (*A. Hemenway & W. Quimby* with him,) for the defendant.

R. Cushman (*J. P. Russell* with him,) for the plaintiff.

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KNOWLTON, C. J. This is an action to recover royalties under a contract in writing, granting the defendant a license to manufacture and sell the machines covered by a certain patent. The principal question in the case, which arose at the trial in a variety of forms, is, What is the proper construction to be put upon this contract? It recites that the parties of the first part are joint owners of Letters Patent "numbered 503,997, issued August 29, 1893 for the term of seventeen years, said Letters Patent being granted for 'Automatic Feed Attachments'" and that the party of the second part, which is this defendant, desires "a license to manufacture, use and vend . . . said Automatic Feed Attachments under said Letters Patent." The party of the second part agrees to pay for each "automatic feed attachment" made and sold, and to be used with a cotton seed linter of its own manufacture, $12, and for each "automatic feed attachment" made and sold without a cotton seed linter, but to be used with a cotton seed linter of its manufacture, $10. The parties of the first part grant to the party of the second part "the exclusive license to make, use and sell, and to vend to others to be sold or used with Cotton Seed Linters of the manufacture of said party of the second part, said 'Automatic Feed Attachments,' for the entire unexpired term for which said Letters Patent were issued." This contract was made on February 1, 1897. It contains numerous other provisions referring to these "automatic feed attachments," which name is always in quotation marks and often immediately preceded by the word "said." It purports to license the manufacture and sale of the attachments for which the patent was granted, that is to say, those covered by the patent, and no others. The first question is whether, treating this as an executory contract, and determining its meaning immediately after its execution, it purported to cover, or can be shown by oral evidence to cover, "automatic feed attachments" which were not within the terms of the patent and not protected by it. From the beginning to the end of it the only terms used to designate the attachments licensed, for the manufacture of which the defendant would be obliged to pay, were the words referring to the patent. To show by oral evidence that other attachments were included would be to contradict its plain meaning, and to vary and en-

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large it. Oral testimony is never competent to change a written contract in this way. It is a familiar principle that, where a written contract is ambiguous and of doubtful meaning, proof of the conditions and circumstances under which it was made, and of the facts to which it relates, may be introduced to apply it properly to the subject matter, and to ascertain the true meaning of its language as it was used by the parties. *Knight* v. *New England Worsted Co.* 2 Cush. 271, 283. *Stoops* v. *Smith*, 100 Mass. 63. *Swett* v. *Shumway*, 102 Mass. 365. *Keller* v. *Webb*, 125 Mass. 88. *Adams* v. *Morgan*, 150 Mass. 143. *Bassett* v. *Rogers*, 162 Mass. 47. *Moran* v. *Prather*, 23 Wall. 492. *Reed* v. *Insurance Co.* 95 U. S. 23. But this rule applies only where the meaning of the writing would otherwise be doubtful. It cannot be applied to contradict the plain meaning of the words, or to engraft upon the writing a provision entirely outside of it. *Glynn* v. *Moran*, 174 Mass. 233, 237. *Menage* v. *Rosenthal*, 175 Mass. 358, 361. *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104, 107. In this particular the present contract is free from ambiguity.

Much oral testimony was introduced in behalf of the plaintiff to aid in the interpretation of the contract, and there were numerous offers of proof by the defendant which were rejected. From these it appeared, or it fairly may be inferred, that the patentees Strong and Mann had been employed by the defendant for a long time in its mechanical department, Strong being its superintendent and having entire supervision of the mechanical work in the factory until his death in 1894. Mann was formerly a travelling salesman, who also worked in the factory more or less in Strong's lifetime and had a leading position there after his death. This patent was for a feeder, to be used as an attachment to a cotton seed linter, which is a machine to separate the lint from cotton seed after the process of ginning. In the linters previously used there had been difficulty in regulating the supply of seed entering the machine so as to obtain the best results. Sometimes it would go too fast, and sometimes too slowly. The patent was for an auxiliary feed roll, to be used with a float, to supplement the action of the roll formerly in use, both rolls being used in the machine and running independently, the auxiliary roll regulating the additional supply of seed

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according to the quantity that the machine would dispose of. Before Strong's death in 1894, there was, in the factory, a cotton seed linter to which an auxiliary automatic feed roll had been adapted, substantially as described in the patent. It does not appear that the defendant, or any one else, ever sold any machines of this construction. It appeared that, beginning in the spring or summer of 1896, the defendant manufactured and sold cotton seed linters with an automatic feed attachment, and also automatic feed attachments to be used with cotton seed linters which it had sold previously, which linters and attachments have a single feed roll, working automatically on the principle applied to the auxiliary feed roll in the patent, a model of which linters, called Exhibit Number 2, was used at the trial. We infer, although this was not proved, that the automatic feed roll, taken by itself, was not novel and not patentable. The patent was in evidence, and it covers the combination of this auxiliary automatic feed roll with the other roll running independently. We also infer, although this too was not proved, that the automatic feed attachments made by the defendant were not infringements upon the patent, and were not patentable. Perhaps, as machines for sale and for practical use, they are as good as the patented machine, if not better. The defendant paid Strong and Mann $500 as royalties for the manufacture of these machines during the year 1896, and before the execution of the contract. Upon this evidence, and upon proof of other conduct of the parties subsequently, it was held by the judge that the written contract was for a license to manufacture and sell machines like model Number 2, and that the defendant was bound to pay the royalty upon all machines of that kind that it should manufacture at any time during the term of the patent. We are of opinion that this was erroneous.

It seems probable upon the evidence that the managers of the defendant corporation, when this contract was executed, supposed that model Number 2 was covered by the patent, and that no one could manufacture it without a license from the patentees. Whether Mann the surviving patentee and joint contractor with the plaintiff supposed so does not appear. The offer of proof of what was discovered in the proceedings for ob-

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taining the patent, and of the amendments that were made after the application was filed, indicate the possibility of his belief that the machine model Number 2 was not an infringement upon the patent. However that may be, we are of opinion that this contract, when it was executed, related only to manufacture and sale under the patent, and did not take away from the defendant the right that everybody had to make and sell any machine not covered by the patent. We are of opinion that the defendant's managers might have said to the parties of the first part the next day after signing the contract, "We have investigated and found that your patent does not cover any machine that we wish to manufacture. We shall, therefore, decline to make or sell any machines under your patent, or to use the license in any way. We shall make such machines as we have been making, independently of any license." Otherwise, upon a contract which in terms bound them to pay royalties only for machines manufactured under a patent, they precluded themselves during the whole term of the patent from manufacturing, except under a license, that which everybody else could manufacture freely. A construction which would have this effect ought not to be given to the contract, unless it is plainly required. That the machines to be manufactured were to be within the patent was of the very essence of the agreement stated in the writing.

So far we have dealt with the contract when it was entirely executory. When the time came for action under it and the manufacture of a particular machine was proposed, new questions would arise. It well might be a matter of doubt, especially with the imperfect knowledge of the facts that the parties had, whether such a machine was covered by the patent. If then, the parties agreed expressly or impliedly, or assumed by their conduct, that a certain machine was covered by the patent, that would be competent evidence of the fact if the matter was doubtful and was litigated. Still further, it is competent for one to agree to pay a patentee a royalty for a license to manufacture a particular machine when he is uncertain whether it is covered by a patent or not. His payment in such a case, is for exemption from disturbance and the possibility of disturbance by the patentee. *Buss* v. *Putney*, 38 N. H. 44. *Heaton-Penin-*

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sular Co. v. *Eureka Specialty Co.* 77 Fed. Rep. 290. If he makes an agreement of that kind, it is no defence to an action for royalties that the patent is invalid, or that his machine is not covered by it. *White* v. *Lee*, 14 Fed. Rep. 789. *Marston* v. *Swett*, 82 N. Y. 526. *McKay* v. *Smith*, 39 Fed. Rep. 556. *National Rubber Co.* v. *Boston Rubber Shoe Co.* 41 Fed. Rep. 48. *Pope Manuf. Co.* v. *Owsley*, 27 Fed. Rep. 100, 108. See also *Eureka Co.* v. *Bailey Co.* 11 Wall. 488. He has and enjoys that which he pays for, namely, immunity from any claim under the patent. The patentee gives up that which might be valuable, namely, the right to prosecute for an infringement. So, under a contract like that between these parties, if the manufacturer says, I will manufacture this machine and treat it as covered by the patent, and the other party assents, he is bound by his agreement so long as he acts under it. It has been said in some cases that he is estopped from denying that what he manufactures under such an agreement is covered by the license. *Andrews* v. *Landers*, 72 Fed. Rep. 666. *Sproull* v. *Pratt & Whitney Co.* 97 Fed. Rep. 807. The same principle has also been applied to hold the defendants liable as licensees in the following cases: *Covell* v. *Bostwick*, 39 Fed. Rep. 421; *Pope Manuf. Co.* v. *Owsley*, 27 Fed. Rep. 100, 108; *Milligan* v. *Lalance & Grosjean Manuf. Co.* 21 Fed. Rep. 570; *Kirkpatrick* v. *Pope Manuf. Co.* 64 Fed. Rep. 369. See also *Eureka Co.* v. *Bailey Co.* 11 Wall. 488; *Jones* v. *Van Kirk*, 2 Fisher's Pat. Cas. 586.

The defendant treated the machines that it manufactured as made under the patent, and, at intervals of six months for four years, made regular returns of the sales of them and paid royalties. It also advertised them extensively as made under this patent, and marked them as patented. This was equivalent to an agreement that machines manufactured while this practice and understanding existed between the parties should be treated as covered by the contract for a license. So long as this understanding existed, the defendant would be warranted in relying upon freedom from any claim by the patentees for an infringement of the patent, and the patentees would be warranted in refraining from attempting to enforce their patent by other proceedings, and in expecting payment of the royalties. In its application to these machines as they were being manufactured

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from time to time, this action by mutual consent was like a new contract for a valuable consideration, not extending into the future, but in force only so long as the action continued, and terminable at any time. Very likely the arrangement was entered into under a misapprehension of the facts. It did not purport to bind the parties for the future. But the mere fact, which the defendant offered to show, that a competitor was manufacturing such machines in defiance of the patent, and that the patentee declined to bring a suit upon his patent, even when the defendant offered to pay the expenses of the suit, would not relieve the defendant from liability if it continued to manufacture and sell under the license. If for such a reason, or for any other, it terminated the arrangement and ceased to act or claim under the patent, and asserted and exercised its right to manufacture and sell afterward adversely to the patent, it could not be held under the contract for that which it afterwards did independently of it. This is, of course, upon the assumption that their machines were not covered by the patent. It follows that a part of the evidence offered by the defendant was erroneously excluded.

Upon the undisputed facts it seems that the defendant is liable for a part of the plaintiff's claim, not because the amount was covered by the original contract, but because the parties have impliedly agreed that it should be treated as so covered. The stipulation fixed the amount of the verdict to be rendered, if it should be "found that the mechanisms which have been manufactured and sold by the defendant are within the terms of the contract sued upon, and that the defendant is liable therefor in this action," etc. We understand that the excluded evidence offered by the defendant might have shown that these mechanisms were not within the terms of the contract, and that the defendant's only liability is to the extent of its manufacture under an implied agreement that they were covered by the patent, and were to be paid for under the license. The exceptions must therefore be sustained, and at the new trial it will be a question whether the machines are covered by the patent, and if not, to what extent the defendant has manufactured them as and for machines covered by the patent, for which the plaintiff had a right to expect a payment of royalties

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under the contract. We do not think it necessary to consider the exceptions more particularly. We have discussed the case without reference to any question of pleading that may arise hereafter.

Exceptions sustained.

MICHELE RUSSO *vs.* ARTHUR B. CHAPIN.

Suffolk. December 2, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, Remedy at law, Multiplicity of suits. *Bond. Practice, Civil.*

A bill in equity for the cancellation of a bond given to the treasurer and receiver general of the Commonwealth under St. 1905, c. 428, by the plaintiff, who is engaged in the business of selling steamship tickets for transportation to and from foreign countries and, in conjunction therewith, in the business of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries, which is conditioned upon the plaintiff faithfully holding and transmitting any money or the equivalent thereof delivered to him for transmission, cannot be maintained on allegations of unconstitutionality of the statute and of liability of the plaintiff to be subjected to a multiplicity of vexatious actions upon the bond which would be avoided by a decree in the equity suit declaring the statute unconstitutional, since the question of the constitutionality of the statute may be raised once for all in any action upon the bond, and a decision that the bond is invalid could be pleaded in bar to the prosecution of any and all other actions thereon, and, therefore, the plaintiff has a complete and adequate remedy at law.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk April 2, 1907, for the cancellation of a bond given by the plaintiff and a surety to the receiver general of the Commonwealth under the provisions of St. 1905, c. 428.

The bill alleged that the plaintiff was engaged in Boston in the business of selling steamship tickets for transportation to and from foreign countries, and, in conjunction therewith, in the business of receiving deposits of money for the purpose of transmitting the same, or equivalents thereof, to foreign countries; that, in accordance with St. 1905, c. 428, he and a surety executed and delivered to the defendant as treasurer and receiver general of the Commonwealth, a bond, the condition of which was that the plaintiff should faithfully hold and transmit any

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money, or equivalent thereof, which should be delivered to him for transmission to a foreign country; that the plaintiff was informed and believed that said statute was wholly unconstitutional and void, and that the bond so filed was wholly void and without force in law; but that he feared that he might be sued in many vexatious actions upon the bond, which actions might be brought a long time hence, and he might be obliged to expend large sums in defending himself therein, and that the issue in each and all of such actions respecting the validity of said bond might be determined finally and conclusively in these proceedings; that, by reason of the provisions of said act, he was obliged to furnish a surety on the bond and to insure the engagement of such surety so long as he engaged in such business, under penalty of being subject to criminal prosecution should he fail to do so; that he had been and would be obliged to pay such surety, furnished and to be furnished, large premiums.

The prayer of the bill was that the said act might be declared unconstitutional and of no effect, and that the bond might be declared void, and that the defendant might be ordered to surrender up and cancel the bond.

The defendant moved to dismiss the bill, and demurred. There was a hearing before *Loring*, J., who reserved the case for determination by the full court.

W. P. Murray, for the plaintiff.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the defendant.

MORTON, J. This is a bill for the cancellation of a bond given by the plaintiff pursuant to the provisions of St. 1905, c. 428, on the ground that the statute is unconstitutional and the bond, therefore, void. It is clear that the question of the unconstitutionality of the statute can be raised in an action on the bond, and that the plaintiff has, therefore, a remedy at law. The plaintiff, however, insists that the remedy at law is not adequate or complete because he may be subjected to a multiplicity of vexatious suits. But the question of constitutionality may be raised once for all in any action upon the bond, or, if a number of actions are brought at the same time, it can be raised in all of them, and a decision in the plaintiff's favor on the question of constitutionality in any one action can be pleaded

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in bar to the prosecution of any and all other actions upon the bond.

There is no doubt that, since St. 1877, c. 178, this court has full equity jurisdiction and that, by virtue thereof, it has power in cases of fraud to declare an instrument void and to compel its cancellation and delivery. *Gargano* v. *Pope*, 184 Mass. 571. But this is not such a case. There is no doubt, also, about the jurisdiction of this court in a case involving a multiplicity of suits. But this is not a case to which that doctrine applies. If the statute is constitutional, the plaintiff is liable for separate and independent breaches of the bond, and, as already observed, a judgment in the plaintiff's favor on the question of constitutionality in one action will settle all others. The result is that the demurrer must be sustained and the bill dismissed. It is not necessary to consider the motion to dismiss.

Demurrer sustained; bill dismissed.

MARY A. JONES *vs.* CITY OF BOSTON.

Suffolk. December 3, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Actions tried together, Conduct of trial. *Way,* Defect in highway.

It is within the discretionary power of a judge of the Superior Court to order two actions of tort by the same plaintiff, one against a municipality under Pub. Sts. c. 52, now R. L. c. 51, for injuries alleged to be due to a defect in the highway and the other against a private individual for alleged maintenance of a nuisance, to be tried together where they depend upon the same state of facts.

At the trial of two actions of tort for personal injuries due to the plaintiff's tripping upon a pipe protruding in a highway, which were tried together, one action being against a city and the other against an individual who was constructing the street under contract with the city, the contractor testified in his own behalf and the defendant city requested the presiding judge to rule that none of his testimony could be used against it. The presiding judge refused to rule as requested, but instructed the jury that all of the witness's testimony could be so used except his admissions, which could be used only against himself. *Held,* that the refusal to rule and the instructions given were correct.

At the trial of an action against a city under Pub. Sts. c. 52, for injuries due to an alleged defect in a highway, there was evidence tending to show that the plaintiff, while rightfully upon the sidewalk of a highway on a dark night, stumbled upon a piece of iron piping protruding eight or nine inches above the

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sidewalk and two or three feet from the curb, and fell, sustaining the injuries complained of, that there were no lights or warnings against using the sidewalk, although the roadway of the street was closed by wooden horses because of construction work going on there, that, previous to the accident, the water department of the city had placed the pipe as it was when the plaintiff stumbled upon it and that it had remained in that condition. *Held*, that there was evidence from which the jury were warranted in finding for the plaintiff.

TORT, under Pub. Sts. c. 52, for injuries received by the plaintiff on September 19, 1896, alleged to be due to a defect in the sidewalk on what then was Seaver Street in Roxbury. Writ in the Superior Court for the county of Suffolk dated November 14, 1896.

The previous history of this case and of the case of *Jones* v. *Collins et al.* is stated in the opinion. There was a motion by the plaintiff that this case and the case of *Jones* v. *Collins et al.* be tried together, which was heard by *Bishop*, J., who declined to rule, as requested by the defendant city, that the court had "no legal power under the laws of this Commonwealth to order an action against a municipal corporation for neglect of a duty imposed by statute tried with an action against an individual for negligence at common law," and granted the motion, and the defendant city excepted. The defendants in *Jones* v. *Collins et al.* were contractors who were building Columbus Avenue which had been laid out and extended to include that part of Seaver Street where the plaintiff was injured, and the basis of that action was the maintenance of a nuisance by the defendants in leaving unguarded and unlighted a sidewalk which was in their care and was unfit for travel, so that the plaintiff fell over a water pipe protruding from the sidewalk.

The two cases were tried together before *Bishop*, J. There was evidence which tended to show that the plaintiff and a companion were walking along the sidewalk, which was a part of the highway, on Seaver Street in Boston in the evening of September 19, 1896, that the companion was leading and the plaintiff was following closely; that it was a very dark night and was raining slightly; that there was a barrier across the end of the part of the street used for teaming purposes, but no barrier or warning or light of any kind upon the sidewalk; that the plaintiff stumbled upon a piece of water pipe which was protruding eight or nine inches above the sidewalk two or three

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feet from the curbstone; that the pipe was left there by persons employed by the water board of the city while the contractors, the defendants in the case of *Jones* v. *Collins et al.*, were at work upon the street.

At the close of the evidence, the defendant requested the presiding judge to rule: "The city is entitled, as a matter of law, to have the jury decide the case on the evidence introduced by the plaintiff and such evidence as it introduced by its attorney, and the jury cannot take into consideration any admissions or statements made by either of the defendants Michael J. Collins or Benjamin A. Ham which were admitted against the objection of the attorney for the defendant city."

The presiding judge refused to give the ruling, and instructed the jury, on this subject, as follows: "Two cases are being tried here together and they rest upon different grounds, they rest upon the same occurrence, that is the reason they are tried together. It is more convenient to try them together. The same state of facts exists in both cases as to the occurrence, but the claim against the city and the claim against the contractors rest upon different grounds, which I will state. . . .

"As against the city of Boston the admissions of Collins and Ham are not evidence. These two cases are being tried together and they involve different claims, as you know, as I have stated. If there is any evidence in this case by Mr. Ham or by Mr. Collins admitting any fact which might make against him, that does not make against the city of Boston. One person has no right to admit anything on behalf of another person; but when those gentlemen are on the witness stand, when those gentlemen have been on the witness stand, certain evidence testified to by them as witnesses may be evidence of facts the same as the evidence of any other witness who may testify, whether this affects the city or any other party."

To the refusal to rule as requested and to the instructions given, the defendant city excepted, as it did also to a refusal of the presiding judge to direct a verdict in its favor.

S. M. Child, for the defendant.

G. F. Ordway, for the plaintiff.

MORTON, J. This is an action for personal injuries, and was tried, pursuant to an order of the court, duly excepted to by the

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defendant city, with another action for the same injuries against the contractors Collins and Ham. There was a verdict for the plaintiff in each case and exceptions were taken by the defendants in each case. Those taken by Collins and Ham have not been presented, and those taken by the city are the only ones before us. The case against Collins and Ham was before this court and is reported in 177 Mass. 444. Subsequently, at a retrial of the case against Collins and Ham, the court, subject to the city's objection and exception, ordered that case and this to be tried together. A trial was had and a verdict was directed for the defendants in each case. The plaintiff took exceptions which were sustained by this court in a decision reported in 188 Mass. 53.

Again the two cases were ordered to be tried together, and the exceptions now before us are to that order, to the refusal of the court at the trial to direct a verdict for the defendant, and to the admission of certain evidence. Whether the two cases should be tried together or separately was a matter relating to the conduct of the business before the court, and was entirely within the discretion of the presiding justice. *Burt* v. *Wigglesworth*, 117 Mass. 302. *Springfield* v. *Sleeper*, 115 Mass. 587. *Witherlee* v. *Ocean Ins. Co.* 24 Pick. 67. If the order directing them to be tried together is subject to revision here, then we see nothing improper in the exercise of his discretion by the presiding justice. The two cases depended on the same state of facts, and the order to try them together tended to economy of time and money. The rights of the defendant were carefully guarded in respect to such matters as affected Jones and Collins, but did not affect the defendant city. There is nothing in the nature of things to prevent a case against a municipality or corporation from being tried with a case for the same injuries against private individuals.

In the opinion pronounced when the case was here before, it was said, "the question for trial in the case against the city was whether the defendant city had used reasonable care and diligence to protect the travelling public against the defect in Seaver Street or Columbus Avenue caused by an iron water shut-off twelve inches above the sidewalk, and three or four inches in diameter; and we are of opinion that the jury could find that it

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had not done so." We see no reason to modify or change the views thus expressed and they conclude the case as it now stands. The testimony for the plaintiff was substantially the same as at the former trial, and the city's defence was substantially the same.

The exceptions in regard to matters of evidence have not been pressed, and we, therefore, treat them as waived. We see no error in the manner in which the trial was conducted.

Exceptions overruled.

BOSTON SAFE DEPOSIT AND TRUST COMPANY *vs.* MARY F. PARKER & others.

Middlesex. December 4, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, BRALEY, & RUGG, JJ.

Devise and Legacy. Words, "Heirs at law," "Then."

A testator in successive items in his will made elaborate provisions for different trust funds and directed the trustee in each instance to pay the income to named beneficiaries, who were in some cases children and in some grandchildren, and to their issue, and in each item closed with a clause similar to the following: "But if the said . . . shall die leaving no children nor descendants living at the time of . . . death then to divide and distribute said estate among my heirs at law." *Held*, that the word "then" was not used as an adverb, but as a conjunction, in the sense of "in that case," or "in that event," and that there was no evidence of an intention on the part of the testator that the words "heirs at law" should have any other than their ordinary meaning of those who were heirs of the testator at the time of his death.

An intention on the part of a testator to give to the words "heirs at law" a different meaning from the ordinary one of heirs of the testator at the time of his death is not to be inferred from the fact that, by the other provisions of the will, ample provision was made for those who were the heirs of the testator at the time of his death.

BILL IN EQUITY filed in the Supreme Judicial Court for the county of Middlesex, August 12, 1907, by the trustee under the will of Thomas Hastings, for instructions.

By the first item of the will, the testator gave $7,000 and certain personal effects to the testator's widow. By the second item he placed $20,000 in trust, directing that the income be

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paid to his widow during her life and that, at her death, the principal become part of the residue of the estate. By the third item he gave $2,000 to his daughter Franscena A. Hastings. By the fourth item he placed $10,000 in trust, and directed that the income and $5,000 of the principal be paid to his grandson Walter H. Whitney during his life, with a provision for the payment of the remainder of the principal to his issue if he died before he became thirty years of age and left issue. This item also contains the following language: "But if said Walter shall die before attaining to the age of thirty years, leaving no children living at his death, then I request my said trustees to pay over and distribute . . . among my heirs at law: but if said Walter shall attain to the age of thirty years and die afterwards leaving no children nor descendants living at his death: then I request my trustees to pay over and distribute . . . among my heirs at law." By the fifth item, the testator gave certain silverware to three grandchildren, children of a deceased son, T. Nelson Hastings. By the sixth item, he placed one fourth of the residue of the estate in trust and directed that the income be paid to his daughter Mary F. Parker during her life and, after her death, that the principal be paid to her issue, or, if she left no issue, "then . . . to distribute and divide among my heirs at law." The seventh item is quoted in the opinion. By the eighth item, the testator gave all but $5,000 of the third fourth part of the residue to his son Alphonzo W., and placed that $5,000 in trust and directed that the income be paid to that son during his life and that the principal be paid to his issue after his death, "but if he shall die leaving no children nor descendants living at his death, then to divide and distribute the same among my heirs at law." By the ninth and tenth items, the testator placed the remaining fourth part of the residue in trust and directed that the income be paid over to the children of his deceased son, T. Nelson, in various proportions, and in each of these two items was the provision that, if the life beneficiaries died leaving no issue living, "then to pay over and distribute," or "then to divide and distribute" "among my heirs at law."

There was a hearing before *Hammond*, J., who made a decree directing distribution under the several items among those who

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were heirs at law of the testator at the time of his death. Certain of the defendants appealed.

W. B. Durant, for the defendants Mary F. Parker and others.

W. D. Whitmore, Jr., for Emeline N. Hastings and others.

E. S. Hill & P. S. Maher, for Hudson B. Hastings and others, filed a brief.

No counsel appeared for the plaintiff.

MORTON, J. This is a bill in equity by the trustee under the will of one Thomas Hastings for instructions concerning the construction of a clause in said will. The clause, omitting immaterial portions, is as follows: "Item 7. I give bequeathe and devise to said Thomas Dana and Lorenzo Massatt . . . the second Fourth part of said remainder and residue of my estate, but in trust nevertheless . . . to pay over the net income and profits thereof to my daughter Franscena A. Hastings . . . for and during the term of her natural life. . . . At the decease of said Franscena A. to distribute and divide said Fourth part among the children of said Franscena or the descendants, of any deceased child . . . living at her death. But if the said Franscena shall die leaving no children nor descendants living at the time of her death, then to divide and distribute said estate among my heirs at law." The question is whether the heirs at law are to be ascertained as of the death of the testator or of the life tenant. The appellants contend that the latter is the true construction. The single justice ruled in favor of the other construction, and ordered a decree to be entered accordingly. We think that the ruling and decree were right.

Ordinarily the words "heirs at law" refer to those who were or will be such at the death of the testator or ancestor and not to some later period. This is the natural import of the words. But where it is evident that the heirs are to be ascertained as of a later period, due effect will be given to the intention thus expressed, if it can be done consistently with the rules of law. There are many cases in which it has been held that a later period was meant. The question in each case is, primarily, one of intention. And the rules that have been laid down and the cases that have been decided are useful only in so far as they aid the court in ascertaining, and, if possible, in giving effect to, the intention in the particular case before it. In the present case

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we think that the words have their ordinary meaning, and that the case is one where the testator, having "exhausted," as was said in *Whall* v. *Converse*, 146 Mass. 345, "his specific wishes by previous limitations, . . . is content thereafter to let the law take its course." The phrase "among my heirs at law," without anything more, is used by the testator repeatedly in the will in regard to the disposition of remainders, and, in view of the well understood meaning of the words, it would seem clear that if the testator had intended that the heirs should be ascertained, in the various cases which would arise, as of some other date than that of his death, he would have said so. The appellants contend that the word "then" in the concluding sentence of the clause now before us, and which appears in a similar connection in other places in the will, is used as an adverb of time and that the testator has thereby signified not only the time when the distribution is to be made but also the persons who are to take. But it seems to us plain that the word is used conjunctively and that the sentence should be construed as if it read "then, in that case or in that event." The appellants further contend that the testator, having made ample provision for those who were his heirs at the time of his death, could not have intended that they should also share in the remainders. But it has been expressly held that an heir at law to whom the testator has given a life estate may also take as one of the heirs at law to whom the remainder is given. *Abbott* v. *Bradstreet*, 3 Allen, 587. The contention is without force, therefore, so far as it is relied upon to show that the heirs at law are to be ascertained as of the death of the life tenant, and not of the death of the testator. We see nothing in the other objections urged by the appellants. The direction to divide and distribute the remainder amongst the testator's heirs at law is equivalent to words of present gift if such are needed, and the testator nowhere manifests any intention to limit the freest and fullest disposition by his heirs at law of what, if anything, may come to them as their shares of the remainders, or to interfere with any disposition which the law might make in case of their death.

Decree affirmed.

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JAMES BUDRO *vs.* FRANK BURGESS.

Norfolk. December 6, 1907. — December 31, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Evidence, Extrinsic affecting writings. *Agency*, Existence of relation.

At the trial of an action for breach of an alleged oral agreement by the defendant, made in consideration of the release of him by the plaintiff from liability for injuries received by the plaintiff while in his employ, that he would pay the expenses of medical attendance upon the plaintiff and after his recovery again employ him as before, it appeared that an agent of an insurance company with whom the defendant was insured against loss by reason of injuries to persons in his employ, after interviewing the defendant, called upon the plaintiff, had a conversation with him, gave him a draft for $50 and received from him a release of the defendant in writing in duplicate, stated to be "for the sole consideration of $50 and doctor's bill not exceeding $25," in which there was no mention of other expenses for medical attendance or of any agreement for future employment. One copy of the release was retained by the insurance company, and the other was delivered to the defendant. The plaintiff sought to establish the oral agreement relied on by introducing in evidence, both in his own testimony and in that of the agent, the conversation that occurred between him and the agent of the insurance company before the release was signed. The plaintiff did not rely on or offer to prove any fraud in the procuring of the release by the agent. The conversation was excluded. *Held*, that the conversation properly was excluded because it would have tended to vary or contradict the instrument in writing; and, *also*, that it was doubtful whether there was any evidence that would warrant a finding that the agent of the insurance company was an agent of the defendant.

CONTRACT for breach of an alleged oral agreement by the defendant that, in consideration of the plaintiff's releasing him from liability on account of injuries received by the plaintiff while in his employ, he would pay a certain sum in cash, would pay the bill for medical attendance upon the plaintiff and would continue to employ the plaintiff as before. Writ in the Superior Court for the county of Norfolk dated May 23, 1906.

The defendant filed an offer of judgment in the sum of $25.75.

At the trial, which was before *Hardy*, J., it appeared that the plaintiff was injured while in the employ of the defendant who did business under the name, Boston Gear Works, and received medical attendance, and that the defendant had a policy in the Ætna Life Insurance Company "assuring him from

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liability on account of any accident" in his place of business. The policy was not in evidence and, except as stated above, neither its terms nor the agreements between the parties nor the authority given by the defendant to the insurance company, were shown.

After the accident to the plaintiff, one Pierce, an "adjuster and investigator" of the insurance company, called upon the defendant and got the details of the accident and the address of the plaintiff, and then visited the plaintiff where, after a conversation, he gave the plaintiff a draft for $50 and the plaintiff signed in duplicate and delivered to him a release which was in evidence, and was as follows:

"For the sole consideration of the sum of $50 and doctor's bill not exceeding $25, this 15th day of February, 1906, received from Boston Gear Works, I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue in respect to all injuries or injurious results direct or indirect arising or to arise from an accident sustained by me on or about the 14th day of February, 1906, while in the employ of the above.

"$75.00 James Budro [seal.]

" Witness, James Hazen Pierce,

address, 4 Liberty Square, Boston, Massachusetts."

One copy of this release was retained by the insurance company and the other was delivered to the defendant by Pierce.

The plaintiff testified in his own behalf and, in order to prove the agreement declared on in the declaration, was asked to state the conversation he had with Pierce before the release was signed. The testimony was excluded and the plaintiff excepted. The plaintiff sought to introduce in evidence the same conversation in the testimony of Pierce, but, although he was allowed to state that he did not remember having had any conversation with the plaintiff with regard to his doctor's bills or his future employment by the defendant, was not allowed to state what the conversation was, and the plaintiff excepted.

Subject to exception by the plaintiff, the jury were directed to return a verdict in the amount of the defendant's offer.

E. J. Parker, for the plaintiff.

W. H. Vincent, for the defendant.

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MORTON, J. We think that the rulings were right. The evidence which was offered tended to vary or contradict the written agreement, and was, therefore, rightly excluded. The release stated that the considerations recited were the "sole consideration." Evidence of a consideration in addition to those contained in the release would have tended directly to contradict the express written agreement that the considerations named were the "sole consideration." The cases on which the plaintiff relies, as deciding that an additional consideration or a separate and independent agreement supported by the same consideration as the written contract may be shown, do not apply. In those cases the contract did not appear to have been intended, as this was, as a complete statement of the whole agreement.

It also may well be doubted whether there was any evidence warranting a finding that Pierce was the agent of the defendant. But it is not necessary to pass upon that question.

Exceptions overruled.

JOHN H. CAMMETT *vs.* CITY OF HAVERHILL.

Essex. November 7, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Defect in highway.

At the trial of an action against a city under R. L. c. 51, § 18, for personal injuries received by the plaintiff and alleged to have been caused by a defect in a highway, it appeared that the plaintiff was thrown from a wagon as he was driving diagonally across a street railway track in the highway because the tire of the forward left hand wheel of his wagon, which protruded beyond the felloe, caught under the edge of the flange of a rail at a point where the flange had been cut away to permit a grating to be placed between the tracks, and that the grating, with the surface of the street, then had sunk below the flange. There was evidence that, if the grating and rail had remained as they were when the grating originally was placed, the accident could not have happened. *Held*, that the defendant was liable if the jury found that the construction and condition of the highway were improper and unnecessary, either as to original construction or later condition, and that there was evidence from which the jury could make such a finding.

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TORT for personal injuries alleged to have been received because of a defect in Merrimack Street, a public highway of the defendant. Writ in the Superior Court for the county of Essex dated September 28, 1903.

At the close of the evidence introduced at the trial, which was before *DeCourcy*, J., the defendant requested the presiding judge to rule that on all the evidence the verdict should be for the defendant, and that there was no sufficient evidence of a condition amounting to a defect or want of repair in the public highway for which the defendant was liable. The requests were refused and the defendant excepted. The jury returned a verdict for the plaintiff.

The facts are stated in the opinion.

E. S. Abbott, for the defendant.

H. J. Cole, for the plaintiff.

KNOWLTON, C. J. The plaintiff was thrown from his wagon and injured while driving on a public street. There was evidence that he was in the exercise of due care. The first question in dispute is whether the condition of the street was such as to create a liability on the part of the city or the street railway company for an accident happening there. The street railway was constructed at this point with two tracks, laid with girder rails having a flange on the inside of the rail. Between the rails of the southerly track a grating was constructed, to carry off water into a catch basin. The flange was cut off from the rails for a distance of two feet, to let the grating into the rail, and in part to drain the rail. As the plaintiff was driving in a southwesterly direction diagonally across the southerly track, the left forward wheel of his wagon passed along near the line of junction between the grating and the southerly rail, and, as the tire projected a little beyond the sides of the felloe of the wheel, it became caught under the corner of the flange at the westerly end of the portion from which the flange had been cut off. The wheel was held there and the plaintiff was thrown out. It is difficult to understand, upon the evidence, how the wheel could have become caught.

Inasmuch as cities and towns are liable for accidents upon highways only when negligent in regard to the condition of the way, the mere fact that an accident happened, from a condition

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which reasonable men in general would not consider unsafe, is not enough to create a liability. A plaintiff must show, in order to recover, not that an accident has happened which no one would have anticipated, but that there were conditions, such that the authorities, in the exercise of proper care, ought to have realized that there was danger of an accident, and to have taken precautions to prevent it. The testimony tends to show that, if the grating had been in the position in which it was originally placed, such an accident could not have happened, and that it had settled a little, so as to be below the bottom of the rail. We are of opinion that it was a question for the jury whether the condition of the grating and the rail rendered the street manifestly unsafe.

It is contended by the defendant that it is not legally responsible for the condition of the street in this particular, and that the street railway company alone should be held accountable for the consequences. The statute which gives a right to recover for accidents of this kind limits it to cases in which the dangerous condition might have been "remedied by reasonable care and diligence on the part of the county, city, town or person, by law obliged to repair the same." R. L. c. 51, § 18. "Highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated," etc. R. L. c. 51, § 1. When railroad corporations construct their tracks across highways and are required by law to keep that part of the way in repair, this provision leaves the city or town with no duty to keep that part of the way in repair, and of course the city or town is not liable for an accident that happens at such a place. *Scanlan* v. *Boston*, 140 Mass. 84. *Rouse* v. *Somerville*, 130 Mass. 361. *Wilson* v. *Boston*, 117 Mass. 509. *White* v. *Quincy*, 97 Mass. 430. But it has been held that the requirement of St. 1871, c. 381, § 21 (Pub. Sts. c. 113, § 32), that street railway companies shall keep in repair the paving, upper planking, or other surface material of the portions of the streets occupied by their tracks, does not relieve the city or town from its general duty to keep the street in repair. *Hawks* v. *Northampton*, 116 Mass. 420. *Fowler* v. *Gardner*, 169 Mass. 505. The following section gives a city or town, against which a recovery has been had for a de-

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fect arising from the failure of a street railway company to do its duty in this respect, a right of action against the company. It is held that the statute puts upon the railway corporation the ultimate duty to repair, but that this "is subordinate to the original duty of the city or town to the public." *Hawks* v. *Northampton*, 116 Mass. 420, 422. This statute was repealed by St. 1898, c. 578, §§ 11, 26, with a clause saving obligations imposed upon street railway companies in the original grants of locations. The restrictions as to laying and maintaining paving, imposed upon the predecessor of the street railway company which maintained this grating, seem, therefore, to be binding upon the company which succeeded to its rights and obligations. *Springfield* v. *Springfield Street Railway*, 182 Mass. 41. *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49. But under the decisions in *Hawks* v. *Northampton* and *Fowler* v. *Gardner*, *ubi supra*, *Lawrence* v. *New Bedford*, 160 Mass. 227, and *Leary* v. *Boston Elevated Railway*, 180 Mass. 203, the defendant was liable to the public for the defective condition of the street, as well between the tracks of the street railway company as elsewhere. If the city could have shown that the construction and condition of the rail and grating at the place of the accident were proper and necessary to the operation of the railway, this would have been a defence. *Lawrence* v. *New Bedford*, *ubi supra*. But if they were improper and unnecessary, either as to original construction or later condition, the city is liable for the accident, even though it has a remedy against the railway company. See R. L. c. 112, § 45; St. 1906, c. 463, § 80.

Exceptions overruled.

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WILLIAM L. WOOD *vs.* ARTHUR C. CUMMINGS.

Essex. November 7, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

False Imprisonment. Assault and Battery. Bankruptcy. Jurisdiction. Conversion.

If a mortgagee of personal property of a bankrupt, having met by appointment the trustee in bankruptcy of the estate of the mortgagor, goes with him into the shop of the bankrupt, and, after having looked over and checked the property, tries to go out from the shop but finds the door fastened, and is told by the trustee in bankruptcy that the door was locked by his orders, the trustee saying to the plaintiff that he had the door locked because he "didn't know but that the plaintiff would have a gang there," and if, after sharp words with the trustee about the locking of the door, the mortgagee raps on the door which immediately is unlocked and he passes out, and the trustee then relocks the door, this is no evidence to support an action for false imprisonment by the mortgagee against the trustee in bankruptcy.

If, with the permission of the owner of a building, a mortgagee of personal property of a bankrupt who has a shop in the building enters the shop, when the trustee in bankruptcy of the estate of the mortgagor appears, and says that he will try to put him out of the shop, and the two wrestle with each other for some time, but the trustee in bankruptcy, being unable to put out the mortgagee, leaves without doing it, and the mortgagee suffers no injury, this gives the mortgagee a right of action against the trustee in bankruptcy for nominal damages for assault and battery in having used force on the person of the mortgagee against his will and without justification of law.

Where a trustee in bankrupty has taken possession of the shop of the bankrupt and its contents and has locked the door of the shop and kept the key, this brings the property of the bankrupt in the shop within the jurisdiction of the court of bankruptcy, and one holding a mortgage on property of the bankrupt in the shop, who has become a party to the proceedings in bankruptcy, cannot obtain a revision of a decree of that court by bringing an action against the trustee in bankruptcy in a court of this Commonwealth for an alleged conversion of the property.

TORT with three counts, the first for assault and battery, the second for false imprisonment and the third for the alleged conversion of certain wood-working machinery and tools on the first floor of a building on Mill Street in the town of Hamilton. Writ dated May 28, 1904.

In the Superior Court the case was tried before *Fox*, J. The material facts in evidence were as follows:

On January 20, 1904, one John F. Smith of Hamilton was

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adjudicated a bankrupt, and on February 29, 1904, the defendant became the trustee in bankruptcy of his estate.

Smith was an undertaker and a manufacturer of musical instruments and occupied as a shop the lower part of the building on Mill Street in Hamilton, in the upper part of which was a tenement occupied by Smith and his wife and children, the whole of the building and realty being owned by his wife, Bertha M. Smith.

At the time of the bankruptcy of Smith, the plaintiff held a mortgage upon his goods and chattels made on May 28, 1900, and recorded in the office of the clerk of the town of Hamilton, covering the engine hereinafter referred to, of which there was a breach of condition by non-payment of principal and interest at the time of the bankruptcy. There was due upon the mortgage at the time of the trial the sum of $146.14, principal and interest.

On February 29, 1904, the defendant as trustee in bankruptcy took possession of the shop and its contents and put a padlock on the door, to which he kept the key. The property in the shop consisted of various wood-working machines, a lot of tools which were admitted to be exempt and were thereafter set off to Smith by the bankruptcy court, and a shaft pump and the engine, which last named articles were included in the schedules filed by the bankrupt in the District Court of the United States, but by subsequent proceedings in the Superior Court were found to have been affixed to the realty and to be a part thereof and therefore to belong to Bertha M. Smith.

On March 1, 1904, Bertha M. Smith by her attorney sent to the defendant a notice as follows:

"You are hereby notified that I am the owner of the premises on Mill street, Hamilton, where I reside, and also part of which has been used by my husband, John F. Smith, for a shop, wherein are fixtures belonging to said house, and as you have the possession of the same and put a padlock on the door of said premises, you are hereby notified to remove any property to which you are entitled by law, from my said premises and said padlock without delay, or I shall hold you liable as a trespasser and also liable for all injuries occasioned by your stopping the heat and water from my premises."

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The defendant did not comply with this notice, but on April 22, 1904, took away all the unsold property except the bankrupt's exemptions, the pump and the engine aforesaid.

On March 2, 1904, the plaintiff met the defendant by appointment. They came from the train together and went into the shop. One Walter Smith, who was with the defendant, remained outside by the door. After looking over and checking the property the plaintiff tried to go out from the shop, but found the door fastened, and was told by the defendant that the door was locked by his orders. The defendant stated to the plaintiff that he had the door locked because he "didn't know but that the plaintiff would have a gang there." Sharp words passed between the plaintiff and the defendant concerning the locking of the door. The defendant rapped on the window in the door, which immediately was unlocked by Walter Smith, and the plaintiff passed out of the shop. The defendant then relocked the door. The plaintiff testified that he suffered no injury nor damage whatsoever from this action of the defendant. This was all the evidence as to imprisonment.

The plaintiff then went upstairs and saw Mrs. Smith and got permission from her to enter the shop. He came down to the shop and finding the door thereof locked, broke it in and entered in the absence of the defendant, making a declaration that he intended to take possession and foreclose his mortgage. The defendant appearing later, objected and said he would try to put the plaintiff out of the shop. At once the plaintiff and the defendant wrestled with each other, and after some time the defendant, not being able to put the plaintiff out, left the premises. The plaintiff put on the door of the shop a padlock of his own and locked it. The plaintiff testified that he suffered no injury nor damage whatsoever from this action of the defendant. This was all the evidence as to assault and battery.

After the events narrated above the defendant filed a petition with the referee in bankruptcy for the district of Essex County, to whom the case of John F. Smith had been referred, and obtained from him an order restraining the plaintiff from interfering with the defendant's possession of the goods and premises aforesaid, and from foreclosing his mortgage, and directing the plaintiff to deliver to the defendant forthwith sole possession

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of the goods and premises. This restraining order was served on the plaintiff on March 2, 1904.

The defendant on March 3, 1904, removed the padlock which had been put on by the plaintiff the day before. The defendant put on a padlock of his own and as trustee in bankruptcy had possession of the premises till April 22, 1904.

On March 10, 1904, the defendant as trustee filed a petition with the referee in bankruptcy praying for leave to sell all the assets of the bankrupt estate free from incumbrances, including the property mentioned in the mortgage of the plaintiff as hereinbefore stated, of which notice was given to the creditors, returnable on March 28, 1904. On March 28, 1904, the petition to sell the assets including the fixtures and the engine aforesaid, free from incumbrances, was granted by the referee after a hearing at which the plaintiff and the defendant were present and both were represented by counsel. The referee ordered the trustee to sell the property at private sale or public auction and file with the referee an accurate account of each article sold and the price received therefor and to whom sold. At the same time by order of the referee the lien of the plaintiff was found to be $390, and was transferred to the purchase money in the hands of the trustee.

The defendant as trustee then sold a portion of the property according to the order at a private sale upon the premises, but on April 5, 1904, was enjoined by the Superior Court from selling the pump and engine aforesaid and the fixtures connected therewith as being part of the realty belonging to Bertha M. Smith, which injunction was made perpetual in a suit in equity which had been brought on April 4, 1904, by Bertha M. Smith against the defendant.

On April 30, 1904, the defendant as trustee filed with the referee a petition, and on June 1, 1904, an amendment thereto, praying to have the order of sale and the order in relation to the lien of the plaintiff made on March 28, vacated, on the ground that these orders were granted with the understanding of the referee and all parties that the engine aforesaid formed a part of the bankrupt's assets, that it had since been decided by the Superior Court that it did not belong to the bankrupt but to his wife, that the plaintiff still had a lien on the engine by virtue of

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his mortgage, that the value of the engine should be considered in fixing the amount of the lien of the plaintiff and should be deducted from the amount of the lien already found, that the order had been made under a mistake of fact, but that a portion of the property had been sold by the defendant as trustee for $145, by virtue of the order of sale and in good faith before any claim had come to his knowledge that the engine did not belong to the bankrupt's estate, and the defendant asked to be protected for these sales.

On June 29, 1904, after a hearing of which due notice was given to the plaintiff, the referee granted the petition and the amendment thereto and vacated the orders made on March 28 as to the sale and the lien of the plaintiff, except as to the property already sold by the defendant as trustee, the sales of which he confirmed, and the referee ordered the defendant to turn over to the plaintiff the sum of $145 less $20 incurred for reasonable and necessary expenses in selling, preserving and moving the property, and all property of the bankrupt's estate remaining unsold, and in case the plaintiff should not accept this, to hold the property and the sum of $125 subject to the further order of the bankruptcy court.

Thereafter, the defendant and his counsel went to the plaintiff and tendered him $125 in cash and the unsold property in storage, both of which the plaintiff refused, stating that he wanted the amount of his mortgage.

The judge found that the defendant had complied with all the orders of the referee in bankruptcy, and still held the unsold property and the sum of $125 subject to the further order of the bankruptcy court.

The laws of the United States relating to bankruptcy were put in evidence and the attention of the court was directed to § 67 which states that "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Upon the foregoing facts the judge ordered a verdict for the defendant upon all the counts in the declaration, and at the request of the plaintiff reported the case for determination by this

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court. If upon the foregoing evidence the plaintiff was entitled to recover upon the first or second count, judgment was to be entered upon such count for nominal damages, and, if the plaintiff was entitled to recover upon the third count, judgment was to be entered for $446.14; otherwise judgment was to be entered for the defendant.

H. Dunham, for the plaintiff.

G. C. Richards, (*A. P. White* with him,) for the defendant.

KNOWLTON, C. J. The plaintiff's claim of damages for false imprisonment is not sustained by the evidence. The testimony shows that the locking of the door was not to imprison the plaintiff, but for another purpose. As soon as the plaintiff made known his desire to go out the door was unlocked, and the plaintiff suffered no injury nor damage. At the time of the alleged assault the plaintiff had entered the shop with the permission of the owner. The defendant, appearing later, objected, and said he would try to put the plaintiff out of the shop. "At once the plaintiff and defendant wrestled with each other, and after some time the defendant, not being able to put the plaintiff out, left the premises." Here was a use of force upon the person of the plaintiff, against his will and without justification in law. For this the plaintiff has a right of action, and may recover nominal damages. *Commonwealth* v. *Collberg*, 119 Mass. 350.

The appointment of the defendant as trustee in bankruptcy and his locking of the bankrupt's shop brought the bankrupt's property in the shop, including that covered by the plaintiff's mortgage, within the jurisdiction of the bankruptcy court. *Ayers* v. *Farwell*, 196 Mass. 349. *White* v. *Schloerb*, 178 U. S. 542. *In re* Kellogg, 121 Fed. Rep. 333, 336. That court, therefore, could deal with the property, and determine the rights of claimants of it. *In re Union Trust Co.* 122 Fed. Rep. 937. *In re Worland*, 92 Fed. Rep. 893, 896. *In re Waterloo Organ Co.* 118 Fed. Rep. 904, 906. *In re Wilka*, 12 Am. B. R. 727. The plaintiff was a party to the proceedings in the court of bankruptcy under which the defendant acted in the final disposition of the property. He did not seek a revision of these proceedings in a higher tribunal, and we cannot revise them here. If there was error in them, which we do not intimate, the court had

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jurisdiction of the parties and the subject matter, and its orders were binding. The defendant, as a trustee acting under such orders, is not liable in this action.

Judgment for the plaintiff for nominal damages.

SOPHRONIA A. DAY *vs.* GUY C. RICHARDS, administrator.

Essex. November 9, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Gift. Donatio Causa Mortis. Savings Bank.

If a man, being very sick, on the day before his death, intending to give a deposit standing in his name in a savings bank to a certain woman, tells the woman's daughter of this intention and says to the daughter, referring to the savings bank book, "Go out in the shop and you will find it in the north corner," and hands her four keys on a ring, one of which unlocks the shop, and the daughter goes to the shop but fails to find the book and so reports to the sick man, and on his repeating the same direction goes again with her brother to the shop and makes another unsuccessful search, and if, upon her telling the sick man that she cannot find the book, he says, "You will, you will," and after his death the book is found in the shop locked in a trunk which is opened by one of the four keys which the sick man handed to the daughter, these facts are not evidence of an actual delivery of the savings bank book to the daughter for the mother such as is necessary to perfect a gift either *inter vivos* or as a *donatio causa mortis*.

Whether a bank book locked in a trunk in a building used for a shop can be delivered as a gift by a delivery of four keys on a ring, of which one is the key of the shop and another is the key of the trunk, here was not passed upon, because, although such keys were handed to a person, the evidence did not show that they were handed to her as a delivery of the book, they being given to her merely for the purpose of getting out the book and bringing it to the owner.

CONTRACT against the administrator of the estate of John M. Gilmore, late of Beverly, to recover the amount standing in the name of the defendant's intestate in the Salem Savings Bank after deducting the amount of debts of the deceased paid by the defendant as administrator, funeral expenses and charges of administration. Writ dated March 30, 1905.

In the Superior Court *Aiken*, C. J., upon the facts stated in the opinion, ruled that the plaintiff was not entitled to recover,

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found for the defendant, and reported the case for determination by this court. If upon the evidence the ruling was wrong, judgment was to be entered for the plaintiff for the balance of the money in the defendant's possession according to the terms of a written agreement; if the ruling was right, judgment was to be entered for the defendant.

D. W. Quill, for the plaintiff.

G. C. Richards, pro se.

KNOWLTON, C. J. This is an action of contract to recover a sum of money deposited in a savings bank by the defendant's intestate and standing in his name in the savings bank book at the time of his death. The only question in the case is whether the book passed to the plaintiff from the defendant's intestate as a *donatio causa mortis*. Upon the evidence and the facts found by the Chief Justice of the Superior Court he ruled that it did not. He found "that the intestate intended to make a gift of the book to Mrs. Day." But his ruling upon the other findings and on the evidence rests, undoubtedly, on the ground that there was no proof of a delivery.

That an actual delivery of the property, such as completely to transfer the dominion and control of it in the lifetime of the donor, must be proved, to establish the validity of such a gift, has often been declared by this court. *Coleman* v. *Parker*, 114 Mass. 30. *McGrath* v. *Reynolds*, 116 Mass. 566, 568. *Pierce* v. *Boston Five Cents Savings Bank*, 129 Mass. 425. *Debinson* v. *Emmons*, 158 Mass. 592. *Scollard* v. *Brooks*, 170 Mass. 445. *Duryea* v. *Harvey*, 183 Mass. 429.

In this case the defendant's intestate had no conversation with the plaintiff herself in regard to making her a gift, and the property was not at any time in his presence after his determination to give it. Being very sick, on the day before his death he expressed his purpose to the plaintiff's daughter, told her in general language where the property could be found, handed her four keys on a ring, one of which unlocked the building in which it was, and said to her, "Go out in the shop and you will find it in the north corner." He made no statement more definite than this as to its location. The plaintiff's daughter went to the shop and searched for it unsuccessfully, and reported the fact to him; he again made the same general statement as to where it was,

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and she went a second time with her brother and made another search without success. Upon telling him again that she could not find it, he said: "You will, you will." After his death her brother found it in the shop locked in a trunk, about which the intestate had said nothing. One of the four keys that the intestate passed to the plaintiff's daughter fitted the lock of the trunk.

The evidence does not tend to show that the keys were handed to the plaintiff's daughter as a delivery of the book, if such an article locked in a trunk in an unoccupied building could have been delivered in that way, which we do not intimate. The keys were entrusted to the plaintiff's daughter to enable her to go and get the book. The owner did not even refer to the book, in terms, as a book, but referred to it only as money. If the plaintiff's daughter had found it and brought it to him, he might have made a manual delivery of it to the plaintiff, or to her daughter for her; but the evidence falls short of showing an actual delivery of the property, such as is necessary to perfect a gift, either *inter vivos* or as a *donatio causa mortis*.

Judgment for the defendant.

JOSEPH B. LEGGE, administrator, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 11, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Carrier. Railroad. Negligence.

Where a corporation operating a railroad has provided a safe way of exit from its grounds for passengers arriving at one of its stations, it is the duty of such a passenger to use the way provided, and if knowingly, without any invitation express or fairly to be implied from the situation and arrangement of the station and grounds, he leaves the way marked out by the carrier and proceeds to make his exit in some other way, he ceases to be a passenger and becomes a trespasser or at the most a mere licensee. It makes no difference that he goes where others, with the knowledge of the carrier, have gone before him unless there is an invitation express or implied on the part of the carrier.

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If a passenger, who has alighted from a train at a station of a railroad corporation where a safe and ample plank walk is provided for exit to the highway, after walking upon it until he nearly has reached the highway, deliberately leaves it and steps down about thirteen inches into a space where sleepers lie uncovered and proceeds to cross a track where he is struck and killed by a train approaching in full view, the administrator of his estate cannot recover for his death as that of a passenger, because he ceased to be one when he left the plank walk, nor as that of a person invited to cross the track, because he was not so invited, and also cannot recover because the intestate was negligent in stepping in front of the approaching train.

TORT by the administrator of the estate of Michael Legge against the New York, New Haven, and Hartford Railroad Company for causing the death of the plaintiff's intestate from being struck by a locomotive engine of the defendant, with three counts, the first count alleging that the intestate was a traveller on Depot Street, a highway in Sharon, and was killed by reason of the failure of the defendant to give the signals required by law at a grade crossing of that highway, the second count alleging that the intestate was killed while he was a passenger of the defendant who had alighted from one of its trains and was attempting to leave its premises, and the third count, added by amendment, alleging that the intestate was killed when by permission and invitation of the defendant he rightfully was crossing the railroad of the defendant at Sharon a few feet south of the crossing by that railroad of Depot Street at grade and between such grade crossing and the Sharon station building of the defendant. Writ dated July 16, 1903.

In the Superior Court the case was tried before *Fessenden*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

M. J. Creed, (*A. S. Graves* with him,) for the plaintiff.

J. L. Hall, for the defendant.

HAMMOND, J. There can be no recovery upon the first count because the plaintiff's intestate was killed before he reached the highway.

There can be no recovery upon the second count because at the time the plaintiff's intestate was killed he had ceased to be a passenger. While it is true that a corporation operating a railroad is bound to use proper care to see that a passenger who alights from one of its cars at a station provided for that purpose has a safe way of exit from its grounds, and that the rela-

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tion of passenger continues until such exit is completed, yet where proper arrangements have been made for such exit it is the duty of the passenger to use them; and, if he knowingly fails to do so, and without any invitation either express or fairly to be implied from the situation and arrangement of the station and grounds, leaves the way marked out by the defendant and proceeds to make his exit in some other way, he ceases from that moment to be a passenger and becomes a trespasser, or at the most a mere licensee. He has stepped from under the aegis by which, up to that moment, the law as to passengers covered him. Nor does it make any difference that he goes where others, with the knowledge of the railroad company, have gone before him, unless there is some invitation express or implied upon the part of the company. Knowledge of such use where proper arrangements have been otherwise provided does not of itself amount to such invitation. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. *Hickey* v. *Boston & Lowell Railroad*, 14 Allen, 429. *Keefe* v. *Boston & Albany Railroad*, 142 Mass. 251. *Webster* v. *Fitchburg Railroad*, 161 Mass. 298. *Cazneau* v. *Fitchburg Railroad*, 161 Mass. 355. *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207.

Applying these principles to the facts of this case, it is clear that at the time of the accident the deceased had ceased to be a passenger. The defendant had provided a safe and ample plank walk for exit to the highway. The plaintiff's intestate was upon it and had nearly reached the highway. Instead of continuing to walk upon it, he deliberately left it and undertook to reach the highway by crossing the railroad tracks. To do so he stepped down from the platform, which was twelve and three quarter inches above the sleepers, into the space where the sleepers lay uncovered, proceeded two and one half feet over the space between the platform and the nearest rail, and had stepped over that, when he was hit by the outgoing train. There was no plank, nor even any beaten path, where he walked after he left the platform. Not only was there no indication that the place had been fitted up as a way of exit or was intended to be used as such, but on the contrary the surrounding platforms, the height of the one from which the deceased stepped, the protruding sleepers, and the entire lack of preparation for the conven-

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ience of one walking there, indeed everything indicated that it was not intended as such a way.

There can be no recovery upon the third count because the plaintiff has failed to show due care on the part of the deceased. For his own convenience he voluntarily left the safe way of exit provided by the defendant, and stepped upon the track upon which a train in full view was approaching, apparently without taking the slightest precaution by way of looking or otherwise for his own safety from injury by the train.

Exceptions overruled.

COMMONWEALTH *vs.* MILLAGE S. ACKER.

Essex. November 14, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Parent and Child. Statute.

An alien who has a domicil in this Commonwealth, and whose wife, also an alien, is living apart from him in this Commonwealth, can be convicted on a complaint under St. 1906, c. 501, for neglecting to provide for the support of his minor child, although the child never has been in this Commonwealth and was abandoned by the defendant in a foreign country seven years before the complaint.

Whether, on a complaint under St. 1906, c. 501, for neglecting to provide for the support of a wife or a minor child, the domicil of the defendant as distinguished from a temporary residence is material, it here was not necessary to consider, because the facts warranted a finding that the defendant had a domicil in the city of this Commonwealth to the police court of which the complaint was made under § 5 of the statute.

COMPLAINT, received and sworn to on May 25, 1907, in the Lynn Police Court under St. 1906, c. 501, charging the defendant with failing to provide for the support of his minor child Percy W. Acker.

At the trial in the Superior Court the case was presented to *Bell*, J., upon an agreed statement of facts, the substance of which is stated in the opinion.

The defendant asked the judge to rule, first, that the court had no jurisdiction and, second, that on the agreed statement of

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facts the defendant was entitled to an acquittal on the ground that the child was not and never had been a resident of this Commonwealth or of this country.

The judge refused to make either of these rulings, and instructed the jury that on the agreed statement of facts the defendant could be convicted of a violation of the statute. The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was submitted on briefs.

F. Keezer & E. M. Shanley, for the defendant.

W. S. Peters, District Attorney, *& H. C. Attwill*, Assistant District Attorney, for the Commonwealth.

KNOWLTON, C. J. The complaint on which the defendant was convicted charged that at Lynn, in the county of Essex, he, "being of sufficient ability, did unreasonably neglect to provide for the support of his minor child Percy W. Acker." The defendant was then living in Lynn, and his wife was living apart from him in this Commonwealth. They were both subjects of Great Britain, having formerly lived in Nova Scotia, where they separated more than seven years ago. Their child Percy W. Acker was born there, and has never been in this Commonwealth. The defendant was neglecting to provide for the support of this child when the complaint was made, and he has made no provision for him at any time within the last seven years, since the abandonment of him in Nova Scotia. The defence relied upon grows out of the foregoing facts as to residence and citizenship.

The case comes within the express terms of the St. 1906, c. 501. That statute prescribes punishment for the offence of unreasonably neglecting to provide for the support of one's wife or minor child, as well as for the abandonment of either of them without adequate support, and it expressly provides that the complaint may be made to the court of the district in which the husband and wife, or either of them, are living, or in which they last lived together.

The defendant's contention is, in substance, that the nature of the offence is such that it cannot be committed if the minor child is an alien whose place of abode is not in the Commonwealth.

While one of the objects of the statute is doubtless to prevent

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wives and children from becoming a charge upon the public for their support, this is not its chief object. The higher and more important purpose of the Legislature in passing the law was to provide directly for neglected wives and children, and to punish the infliction of this kind of wrong upon them, and, by the fear of punishment, to deter husbands and fathers from leaving their families to endure privation. There is nothing either in the words or the object of the statute that should limit its application to cases where the neglected person happens to be in this Commonwealth at the time of the neglect, or at the time of the prosecution for it. A person domiciled in this Commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the Commonwealth by his father, or has been left by him in another State or country, if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here, within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children, whether they are here or elsewhere. If he fails to do this, his neglect of duty occurs here, without reference to a place where the proper performance of his duty would confer benefits.

If the domicil of the defendant, as distinguished from a temporary residence, is important under § 5 of the statute, which we do not decide, the facts agreed well warranted a finding that his domicil was in Lynn, notwithstanding that he was an alien. *Harvard College* v. *Gore*, 5 Pick. 369, 377. *Olivieri* v. *Atkinson*, 168 Mass. 28, 31. *Wilbraham* v. *Ludlow*, 99 Mass. 587. *Viles* v. *Waltham*, 157 Mass. 542. *McConnell* v. *Kelley*, 188 Mass. 372.

Exceptions overruled.

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WILLIAM G. BROOKS *vs.* JOHN F. REYNOLDS & another.

Suffolk. November 14, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Bail. Bond. Scire Facias. Arrest. Execution.

A woman who has been arrested on mesne process in an action of tort and has given a bail bond conditioned to abide final judgment and "not avoid," after judgment has been obtained against her and execution has issued thereon with no *capias* clause, is bound to present herself where demand for the judgment debt can be made upon her, so that if she fails to pay the debt the judgment creditor may proceed against her by petition for her examination, and if after diligent search she cannot be found for the purpose of such a demand it is an avoidance and a breach of her bond.

Scire facias under R. L. c. 169, §§ 7, 8, is a proper remedy for the breach of a bail bond given by a woman arrested on mesne process in an action of tort, although there also is a remedy by an action of contract under R. L. c. 168, § 66.

SCIRE FACIAS on a bail bond dated March 6, 1901, executed by Maude Poole as principal and by John F. Reynolds and John F. Canning as sureties. Writ dated April 16, 1906.

The condition of the bond sued upon was as follows:

"The condition of this obligation is such that whereas the body of the above bounden Maude Poole is taken by force of a writ or process bearing date 4th day of March A. D. 1901, wherein William Gray Brooks is plaintiff, and the said Maude Poole of Detroit in the State of Michigan, commorant in Boston in the County of Suffolk, is defendant, returnable before the Justices of our Superior Court to be holden in Boston within and for our said County of Suffolk on the first Monday of April next, to answer unto the said William Gray Brooks, to be heard and tried at our said Court as by the return of said writ of process will appear.

"If, therefore, the above bounden Maude Poole shall appear before the said Justices of said Court as aforesaid to answer to said William Gray Brooks in the action aforesaid and shall abide the final judgment thereon, and shall not avoid, then the above written obligation shall be null; otherwise it shall remain in full force and virtue."

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At the trial in the Superior Court before *Hitchcock*, J., where the case was defended by the defendant Canning alone, the facts appeared which are stated in the opinion. The defendant Canning asked for seven rulings, all of which were refused by the judge, particularly the first and seventh, which were that upon all the evidence the plaintiff could not recover, and that upon all the evidence the defendant was entitled to a verdict. The judge ordered a verdict for the plaintiff; and the defendant Canning alleged exceptions.

The case was submitted on briefs.

C. E. Eldredge, for the defendant Canning.

T. J. Gargan, *P. M. Keating*, & *S. C. Brakett*, for the plaintiff.

HAMMOND, J. This is an action of *scire facias* against the sureties on a bail bond for one Maude Poole, a woman, who was arrested upon mesne process in an action of tort. In that action the plaintiff obtained judgment against her, execution was issued thereon in which there was no *capias* clause, and upon which the officer returned that he had made diligent search for the "within named Maude Poole and for the goods chattels or lands of the within named judgment debtor Maude Poole upon which" he "might levy," and that he had been unable to find either. This is a return that he was unable to find either the debtor or any property. The first question is whether there has been a breach of the bond.

The defendant Canning, upon whose exceptions the case is before us, contends that there can be no breach of a bail bond until there has been a return of *non est inventus*, and that since there can be no capias clause in an execution against a woman, there never can be any such return; and hence the bail bond given by a woman rightfully arrested never can be enforced. His position is thus stated in his brief: "And while this may seem strange, yet upon a careful reading and examination of the authorities and the history of the legislation relating to the arrest of women, bail, *scire facias* and the like, it appears conclusive that no avoidance of the principal can be shown, inasmuch as in the case at bar no execution issued running against her body, and that the statutes do not provide for charging bail in cases of women." In other words, while there is a right to arrest a woman on mesne process in an action of tort, and

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while her rights and those of the plaintiff as to the manner of giving bail are carefully prescribed by the statutes, still, after the bail bond is properly executed, there is no way of charging the bail; the bond, so far as protecting the plaintiff, for whose security it is given, and binding the defendant, for whose relief it is given, is a mere nullity. When a conclusion like that is reached, one begins to distrust the line of reasoning leading to it and thinks of testing the matter by what is called common sense.

The investigation calls for an examination of the remedies given by the statutes to judgment creditors against a female judgment debtor. The process for the satisfaction of an execution against a man is different from that against a woman. Under certain circumstances which are fully set out in the statutes, a man can be arrested upon an execution, but a woman never can be. No execution against a woman can properly contain an order to arrest, and should such an order be inserted no officer could legally obey it. She is to be reached, if at all, by a different process. The process provided at the time this bail bond was given is set forth in Pub. Sts. c. 162, §§ 6–15, both inclusive, and substantially re-enacted, so far as material to this case, in R. L. c. 168, §§ 6–15, both inclusive. Under these statutes "the judgment creditor in an execution issued against a woman upon a judgment for twenty dollars or more exclusive of costs . . . may cause payment thereof to be demanded of her by an officer qualified to serve such execution; and if upon such demand she fails to pay it or to expose sufficient property to be taken by such officer to satisfy it, the officer shall, upon request of the judgment creditor, make a return of his doings upon said execution." It is provided that "After such demand the judgment creditor . . . may . . . file [in the proper court] a petition under oath, with a copy of the execution and the return of the officer thereon, stating the fact of such judgment and demand and alleging that he believes that she has property, not exempt from attachment, which she refuses to apply in payment of said execution, or to expose the same so that it may be taken thereon, and asking that a citation may issue, requiring her to appear . . . and submit to an examination relative to her property."

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Upon proceedings under this petition she may be fully examined as to her property, and may be ordered, either by exposure of the same or by conveyance, to apply it to the satisfaction of the execution; and upon her failure to comply with any such order she may be committed by the court "as for a contempt, until she complies with such order or is otherwise discharged according to law." R. L. c. 168, §§ 7–15, both inclusive. In this way the statutes provide a very efficient remedy for the satisfaction of a judgment rendered against a woman who is able to pay. It is to be observed, however, that, whereas in a proceeding under the poor debtor laws against a man the arrest is made under the execution, in these proceedings against a woman no arrest is made upon the execution, but the committal if any is by order of the court founded upon the petition, and it is in the nature of a proceeding for contempt for not complying with the order.

There are several essential preliminaries to these proceedings by petition, among which is the requirement that the judgment creditor must have caused payment thereof to be demanded of the judgment debtor by an officer qualified to serve the execution. It is only after such a demand that the creditor can file his petition for the examination of the debtor. The demand must be made upon her in person. If the officer cannot find her, then of course the demand cannot be made. In the present case it appears by the return that the officer has made diligent search for the judgment debtor and cannot find her.

The condition of the bond was that the defendant named in the original writ should "abide the final judgment thereon, and . . . not avoid." Although the defendant could not have been arrested upon the execution even if she had presented herself, yet the demand could have been made upon her and it was her duty to be where such a demand could be made. It was the only act requiring her personal presence to which the judgment creditor was entitled. Her failure to present herself, or to be where after diligent search she could be found for the purpose of such a demand, is an avoidance and a breach of the bond.

Now what is the remedy? There is a remedy under R. L. c. 168, § 66, by an action of contract. We think also that there is a remedy by way of *scire facias* under R. L. c. 169. While the

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provisions of that chapter seem to be applicable more generally to cases where, after judgment, the right to arrest and hold a debtor continues for the purpose of taking the body to satisfy the execution, and while a female judgment debtor cannot be held for such a purpose, still we think the bail bond must be held to be intended to secure her personal presence after judgment, so far at least as to enable the demand to be made which is required before proceedings for her examination under R. L. c. 168, above stated. By the bail bond she has been released from arrest. If before judgment in the original action she should be legally surrendered into court by her bail, we have no doubt that she could be held to new bail in the same way in which she was held upon the original bail. And if she be surrendered after judgment, we have no doubt that while she could not be committed to jail so as to be taken on execution (see R. L. c. 169, § 10), yet unless released by new bail or otherwise she could be held, as under the original arrest (if not bailed or not released on recognizance), a reasonable time for a demand to be made upon her. If her physical presence is required for any service of the execution which can be made and which is essential to the right of the judgment creditor to proceed by petition under the statute for her examination, then he is entitled to such presence. To that extent at least the bond secures the creditor, and if there be a breach in that respect the writ of *scire facias* is applicable. If she be personally present, then the demand can be made upon her and the sureties are not further bound. If she be not personally present so that a demand can be made, then there is a breach, and *scire facias* will lie upon the bond, with the right in the sureties, under R. L. c. 169, § 9, to exonerate themselves by surrendering their principal in court before final judgment on the *scire facias*, and by paying costs.

Exceptions overruled.

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N. MAYO DYER *vs.* CITY OF MELROSE.

Middlesex. November 14, 15, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Tax, Assessment.

The salary of an officer of the federal government, after it has been paid and has come into the possession of the officer, loses its identity as salary and becomes liable to taxation by the Commonwealth under the general law.

CONTRACT to recover the amount of a personal property tax alleged to have been illegally assessed and paid under protest. Writ in the First District Court for Eastern Middlesex dated December 17, 1904.

On appeal to the Superior Court, the case was tried upon an agreed statement of facts before *Fessenden*, J., who found for the defendant, and the plaintiff appealed.

The facts are stated in the opinion.

W. H. Hitchcock & C. M. Pratt, for the plaintiff.

C. L. Allen, for the defendant.

KNOWLTON, C. J. We do not find it necessary to consider whether the plaintiff has chosen a proper remedy, for, if we assume this in his favor, we are of opinion that he cannot recover. The property said to have been taxed illegally was money on deposit in two national banks. The ground on which the plaintiff claims for it an exemption from taxation is that it was derived from his salary as a rear admiral in the navy of the United States. He was a resident of the city of Melrose, and was properly taxable there on all his personal property that was not exempt from taxation. He relies upon the decision in *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, in which it was held that a State cannot lay a tax upon an office under the government of the United States, nor upon any means or instruments used solely for the maintenance of the federal government or the performance of any of its functions. The principle on which the case was decided has been reaffirmed repeatedly and held to apply to taxation of State officers by the federal government. *The Collector* v. *Day*, 11 Wall. 113. It

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precludes taxation by either government of the salary or emoluments of an officer of the other; but it has never been held, under a general provision for the taxation of the property of individual owners, to prevent the taxation of money or other property merely because it was derived from an official salary that had been received and held for use by the officer. The reason of the decision does not go far enough to warrant following the money after it has become a part of the general estate of the owner and has lost its distinctive character as a part of the governmental machinery, which it has up to the time when it passes into the general control of the officer. In *Union Pacific Railroad* v. *Peniston*, 18 Wall. 5, the doctrine is stated as follows: "It is, therefore, manifest that exemption of federal agencies from State taxation is dependent, not upon the nature of the agencies, or upon the mode of their constitution, or upon the fact that they are agents; but upon the effect of the taxation, that is, upon the question whether the taxation does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform."

When the salary has been paid by the government to one of its officers and has come into his possession, it loses its identity as salary, and becomes money, effects or credits which are liable to taxation under the general law. It is within the principle which was applied, under the statute exempting pensions from a liability for debts, in *Kellogg* v. *Waite*, 12 Allen, 529, *Spelman* v. *Aldrich*, 126 Mass. 113, and *Tully* v. *Tully*, 159 Mass. 91. See also *Hibernia Savings & Loan Society* v. *San Francisco*, 200 U. S. 310; *Blake* v. *Bolte*, 31 N. Y. Supp. 124; *Melcher* v. *Boston*, 9 Met. 73.

Any other rule would enable one to hold property free from liability to contribution towards the support of the State government, merely because he obtained it as a compensation for services rendered to the federal government.

Judgment for the defendant.

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ANTOINETTE HATCH *vs.* UNITED STATES CASUALTY COMPANY.

Suffolk. November 16, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Insurance, Accident. *Words*, "Event causing the injury."

A policy of insurance provided for insurance "against loss . . . caused by bodily injury effected exclusively by external, violent and accidental means, provided written notice of the injury, whether fatal or non-fatal . . . be given by the insured or the beneficiary to the . . . company within ten days of the event causing such injury," and stipulated for the payment of certain named sums in case of "loss of life occurring within ninety days of the event causing the injury," and in case of other losses, specifying that each must occur "within ninety days from the event causing the injury." In an action by the beneficiary under the policy, the declaration alleged that the insured on July 7 met with an accident which was within the terms of the policy but "did not consider" it "of any account," that from August 7 he was confined to his bed until August 11, when he died as a result of the accident, that he had given no notice to the defendant but, within four days after his death, the plaintiff gave notice. The defendant demurred. *Held*, that the requirement that the insurer should be given notice within ten days of the event causing the injury is a condition precedent to the creation of liability under the policy, that the "event causing the injury" was the accident, and that, therefore, the requisite notice was not given and the demurrer must be sustained.

CONTRACT upon two policies of accident insurance. Writ in the Superior Court for the county of Suffolk dated December 4, 1906.

The defendant demurred to the declaration, and the demurrer was sustained by *Fox*, J., and the plaintiff appealed.

The material allegations of the declaration and portions of the policies of insurance are stated in the opinion.

A. J. Bailey, (*D. R. Smith* with him,) for the plaintiff.

R. Spring, for the defendant.

HAMMOND, J. This is an action brought by a beneficiary upon two insurance policies. The declaration contains two counts, one on each policy; and the question upon each count is whether upon the allegations therein contained it appears that the notice required by the policy was seasonably given to the defendant. So far as material to this question the language is

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the same in each of the policies and the allegations are the same in each count; and therefore in discussion we shall speak only of the first count.

The allegations of this count as to notice are as follows: "Item 4. The insured on July 7, 1906, met with an exclusively external and violent accident, namely, fell, but did not consider the accident of any account; from about August 7, 1906, he was confined to his bed, and on August 11, 1906, within ninety days after the fall, died, and immediately upon the death the plaintiff was informed and before that time had no knowledge or information that the death was effected exclusively by the fall; the death was not from any cause excepted in the policy. The plaintiff thereupon within four days after the death gave notice thereof to the defendant at its Home Office with the fullest information obtainable at the time and this was the only notice given up to that time to the company by the insured or the beneficiary; all other things to be done or observed as provided in the policy were so done or observed."

The policy is a long document. It recites that the defendant company, in consideration of a certain premium and of the warranties and agreements in the application "which is made a part hereof," insures Cyrus J. Hatch "against loss as hereinafter provided, caused by bodily injury effected exclusively by external, violent and accidental means, provided written notice of the injury, whether fatal or non-fatal, together with the fullest information obtainable at the time be given by the insured or the beneficiary to the home office of the company within ten days of the event causing such injury, to wit, (a) loss of life occurring within ninety days of the event causing the injury five thousand dollars; (b) loss of both eyes, meaning total and permanent blindness for life occurring within ninety days of the event causing the injury, the amount stipulated for loss of life." And thus the policy proceeds to enumerate several other kinds of loss insured against, such as that of an arm, hand or foot, stipulating in each case that the loss shall occur within "ninety days from the event causing the injury." It also enumerates as among the things insured against, (k) "total loss of time, meaning that period immediately following the event causing the injury during which the insured is thereby rendered, independently of any and

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all other causes, wholly and continuously unable to transact each and every part of the duties pertaining to his occupation," twenty-five dollars a week, "not to exceed 104 consecutive weeks"; also "(l) partial loss of time," and "(m) total disability for life," occurring in each case "independently of any and all other causes" and "immediately following the event causing the injury." Then follows the statement that "if an injury, whether fatal or non-fatal, is caused or contributed to, primarily or secondarily, wholly or partly, directly or indirectly, by" any one of the many things or under certain conditions there enumerated in great detail, the liability of the company for any of the losses shall be only one half of the amount previously stipulated. These various causes or conditions of injury are not here set out, but upon reading them in detail it plainly appears that the word "injury" therein spoken of means injury to the person of the insured and nothing else. The same remark may be made of the word "injury" as used in the seventh paragraph of the policy. There are many other provisions in the policy, but, as they have no bearing on the question before us, they are not here set out.

What is the fair construction of this policy as to when the notice must be given? The defendant contends that the event causing the injury is the accident, and hence that the notice must be given within ten days of the accident. The plaintiff contends that there can be no event "causing the injury" until there is an injury, and that, the death of the insured being the injury, a notice given within ten days of the death is sufficient, and hence that there is no forfeiture.

It is to be premised that the giving of this notice is not a condition subsequent, as it has been sometimes called. It is not simply a part of the rule of procedure for the enforcement of the liability of the defendant, as are the provisions of the fifth paragraph in this same policy providing for proofs of loss. The promise to insure is not absolute but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given, shall be given. It is a condition precedent to the creation of liability or to the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action.

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It is further to be observed that we are not dealing with a case where it was impossible to give a notice, as where death is contemporaneous with the accident and the fact of death is not known nor can be known until more than ten days after the accident. In the case before us the insured lived more than a month after the accident, apparently in his usual health, for "he did not consider the accident of any account."

The insurance is "against loss . . . caused by bodily injury effected exclusively by external, violent and accidental means." It is perfectly plain that the injury here spoken of is injury to the person of the insured, and this construction is borne out by the subsequent provisions of the policy. Hence of course it is an injury suffered by the insured and not by the beneficiary. Moreover it is an injury caused by external, violent and accidental means. Any injury from other means or causes is not included. The injury is to be traceable exclusively to the accident to the person. If it is so traceable, then, no matter when the symptoms appeared or when they were recognized, it is covered by the policy; otherwise it is not. Every pain or result traceable to the accident, no matter how remote in time, is potentially caused at the time of the accident. Nothing is more familiar than this rule. It is constantly applied, especially in cases where damages are sought for injuries to the person. Within the contemplation of the law and by the construction of the contract the liability, when finally fixed, not only goes back to the accident, but also goes forward to the time, no matter how far in the future, when there is no longer any result traceable to it; and this is so, entirely irrespective of the question whether or not the insured knows or conjectures what the injury is or will finally develop to be. The event causing the injury is not the injury itself, but is the "external, violent and accidental means" by which the effect upon the body — the injury — is caused. We can see no other sensible construction of the language of the policy. We recognize the principle that in the case of an ambiguity in the meaning of an insurance policy complicated in its terms and drawn up by the insurer, every doubt is to be resolved in favor of the insured, to the end that the purpose of the contract, which is one of indemnity against loss, may be attained; but we must also recognize another principle equally imperative,

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namely, that parties have the right to make their own contracts and, in the absence of fraud, or some other legal reason justifying a repudiation or breach, must be held bound by them. Hence where, as in the case before us, there is but one reasonable construction of the contract possible, no matter how hard that construction may seem to be in its result upon one or both of the parties, we are not at liberty to reject it but must expound the writing as it was made and as it stands.

In the case before us the event causing the injury occurred on July 7, 1906. The insured did not think he was hurt, and upon the allegations of the declaration it must be assumed that he was apparently in his usual health until about August 7 of the same year, when he was confined to his bed, dying four days afterward. He knew of his fall and must be taken to have been in full possession of his faculties and capable of giving the notice of it to the defendant within ten days thereafter. He had voluntarily become a party to the contract and had made himself liable to its conditions, including the one with reference to notice. He could have taken either one of two courses. He could have given the defendant seasonable notice and then it would have been bound by the results to him of the fall, or he could have acted upon his own idea of the fall and have taken the consequences himself. He could not take a third course, namely, give no notice and still hold the defendant. By failing to give notice under these circumstances, he in substance gave up his right to hold the defendant, so that at the time of his death the defendant was free from liability for this fall and its consequences.

After his death it was not in the power of the beneficiary to revive the right lost by the insured in his lifetime. While it is true that the contract provided that, in case of the death of the insured from any risk insured against, the indemnity was to be paid to her if surviving, still her rights as a beneficiary rest upon the contract, and the failure of the insured to fix the liability of the defendant by a notice was a failure to complete the contract, not only so far as concerned any benefit to him or his estate, but also so far as concerned any to her.

If it be said, as it sometimes is, that such a defence is purely technical, the answer (if one is needed) is that the provision for

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notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when a claim for indemnity is made. It was one to which the insured agreed, and it is not unreasonable. See for authorities bearing upon the question, *Moore* v. *Wildey Casualty Co.* 176 Mass. 418; *Swain* v. *Security Live Stock Ins. Co.* 165 Mass. 321; *Mandell* v. *Fidelity & Casualty Co.* 170 Mass. 173; *Paul* v. *Fidelity & Casualty Co.* 186 Mass. 413; *Gamble* v. *Accident Ins. Co.* 4 Ir. Rep. C. L. 204; *Patton* v. *Employers Liability Assurance Corp.* 20 L. R. (Ir.) 93; *Whalen* v. *Equitable Accident Co.* 99 Maine, 231; *Heywood* v. *Marine Accident Association*, 85 Maine, 289; *Travelers' Ins. Co.* v. *Nax*, 142 Fed. Rep. 653 (an instructive case).

Our attention has been called by the plaintiff to several cases upon which she relies in support of her contention, among which are the following: *McElroy* v. *John Hancock Ins. Co.* 88 Md. 137; *Phillips* v. *United States Benevolent Society*, 120 Mich. 142; *United States Casualty Co.* v. *Hanson*, 20 Colo. App. 393; *Trippe* v. *Provident Fund Society*, 140 N. Y. 23; *Rorick* v. *Railroad Officials' & Employees' Accident Association*, 55 C. C. A. 369; *S. C.* 119 Fed. Rep. 63 (a majority opinion the errors of which are well shown in the dissenting opinion by Gilbert, J.); *Hoffman* v. *Manufacturers' Accident Indemnity Co.* 56 Mo. App. 301; *Odd Fellows Fraternal Accident Association* v. *Earl*, 70 Fed. Rep. 16. We have examined them all. In many of them the language in the policy seems to differ materially from the language in the policy before us, and the result reached may have rested upon that difference. But, however that may be, so far as the decision in any of them is inconsistent with the decision in this case, we cannot follow them.

The result is that as to each count the demurrer is sustained.

Judgment for the defendant.

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COMMONWEALTH *vs.* JACOB SCHWARTZ.

Suffolk. November 18, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pawnbroker. Words, "Business."

It seems, that one, who has no license to carry on the business of pawnbroking, may have committed one or more acts of receiving articles on pawn and not be guilty under a complaint which alleges that he was carrying on the business of pawnbroking without a license, since it is the occupation and not the act of pawnbroking that is complained of.

At the trial of a complaint under R. L. c. 102, §§ 33, 38, charging the defendant with carrying on the business of pawnbroking without a license, it appeared that the defendant had a license to buy and sell second-hand articles but did not have a license to carry on the business of pawnbroking, and a witness testified that, as he was seeking a place to pawn his overcoat, he was passing the store of the defendant and his partner when they accosted him and asked him whether he wanted to buy some clothes; that, on his stating that he did not wish to buy but desired a loan on his overcoat, he was asked to step inside; that he did so, and, after negotiations, the defendant paid him $2.50 and took his overcoat; that, on his asking for a ticket, one of the partners, both being present, stated that they did "not give tickets on overcoats, and that his overcoat would be all right, and that he could get it at any time he called for it by paying $3, which would be fifty cents interest," and that he was repeatedly assured by them that he could have his coat at any time he called for it. There was evidence that the record of the transaction made by the defendant and his partner was of a purchase by them, and that it was so reported to the police department under the terms of their permit. The defendant contended that there was evidence of a single act of pawnbroking only, and not of a carrying on of such a business. *Held*, that there was evidence warranting a finding that the defendant was carrying on the business of pawnbroking without a license.

COMPLAINT, taken out and sworn to in the Municipal Court of the City of Boston December 4, 1906, charging the defendant and one Harris with carrying on the business of pawnbroking without a license.

On appeal to the Superior Court the case was tried before *Gaskill*, J. It appeared that the defendant and a partner were licensed only to carry on the business of buying and selling second-hand articles on Salem Street in Boston, that the record on their books of the transaction with McKinnon, the testimony regarding which is stated in the opinion, was of a purchase by them, and that, the next day after the transaction, it was so re-

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ported by them to the police department in the regular course of their business. Other facts are stated in the opinion.

At the close of the evidence, the presiding judge refused, as stated in the opinion, to grant requests of the defendant for rulings, the jury found the defendant guilty, and the defendant alleged exceptions.

The third request, referred to in the next to the last paragraph of the opinion, was as follows: "3. The evidence does not warrant the jury in finding that the defendant was concerned as an actor in the carrying on of the alleged business of pawnbroking so as to make him a proper guilty defendant in this prosecution."

N. Wolfman, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth, submitted a brief.

HAMMOND, J. The defendant Schwartz was jointly charged with one Harris with carrying on the business of a pawnbroker without a license. Harris pleaded guilty and was fined.

At the trial of Schwartz, upon whose exceptions the case is before us and whom we shall designate when using the word defendant in the singular, the evidence as to the nature of the transaction which took place between the witness and the defendants was conflicting, but it warranted a finding that the coat was not sold but was pawned to the defendant. The record states that "the defendant is not charged, nor has he been shown, to have committed any other alleged act of pawnbroking." We understand this to mean that there is no evidence either direct or circumstantial of any other contract of pawnbroking. Hence, so far as respects any actual contract of pawnbroking, the government's case rests upon this one alone. Such being the case, the defendant at the close of the evidence asked the court to rule, first, that the defendant had not been shown to have carried on the business of pawnbroking within the meaning of the statute, (R. L. c. 102, §§ 33, 38,) upon which the complaint was based, and second, that, even though the jury should find that the defendant did a single act of pawnbroking, unless they also found that he did at least one other such act, they should acquit him. The court refused to give either instruction, but left the case to the jury under instructions which authorized them to convict if, at his place of business, the defendant did, as a part

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of the business there carried on, take in property upon pawn. The defendant excepts to the refusal thus to rule, but does not appear to have taken any exception to the charge given.

In support of his requests the defendant insists that the complaint is for carrying on the business of pawnbroking; that this has reference to an occupation as such, and not merely to an act or even a series of acts unconnected with each other and performed not in the pursuit of an occupation or business; and hence that the proof of one single act alone is insufficient to warrant a conviction. It may be assumed in favor of the defendant that all this is correct, and that, if in this case the only evidence that the defendant was carrying on the business of pawnbroking is that he had once received on pawn a single article without any evidence as to the circumstances attending the act, or as to the subsequent conduct of the defendant when questioned as to the act, then the defendant's first request should have been given. The complaint was for carrying on the business and not for the act of receiving the coat on pawn. It is the occupation and not the act itself which is the thing of which complaint is made. There may be one or more acts of receiving articles on pawn, and yet no occupation.

But it by no means follows that in order to prove that one is engaged in the business it is necessary to prove more than one contract of pawn. Indeed it is conceivable that one may have entered upon the business and have had many articles tendered to him for pawn and considered the bargains offered to him by the owners, and yet, by reason of the inability of the parties to agree upon terms, no actual contract of pawnbroking may have been completed. Yet such a person is engaged in the business of pawnbroking, dull although it may be, within the meaning of our statute. As was well said in a case upon a similar statute as to the sale of intoxicating liquors, "It is the occupation and not the act of selling which is taxable." "There may be one or more sales and yet no occupation of selling, or there may be the occupation of selling without even a single sale." *Merritt* v. *State*, 19 Tex. App. 485.

The jury having found that the defendant had received the coat on pawn, had further to look into the question whether that act was an act done not incidentally to the business of buying

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and selling second-hand articles for which the defendant was duly licensed, but in the independent business of pawnbroking; or, in other words, was the defendant engaged not only in the business for which he was licensed, but did he keep his shop open also for the transaction of pawnbroking as an independent business? Did he intend to carry on that business, and was this act done in pursuance of that intent and as a part of the business?

Upon this question the evidence was very suggestive. McKinnon testified that on November 14, 1906, he came to Boston from Brockton, and stayed over night in Boston; that on the fifteenth, being short of money, he went to pawn his overcoat so that he could obtain money enough "to carry him through"; that as he passed the defendants' store they were standing in front of the door and asked him if he wanted to buy some clothes; that he replied that he did not want to buy, but only wanted to get a loan on his overcoat; and that Harris then asked him to step inside and take off his overcoat. He further testified in substance that he pawned the coat, taking $2.50, which was all he needed; that he then asked for a ticket, but was told by one of the defendants (which one he could not tell), both being present, that "they did not give tickets on overcoats, and that his coat would be all right, and that he could get it at any time he called for it by paying $3, which would be fifty cents interest," and that, upon his saying that he did not wish to lose the coat, the assurance that he could have it at any time he called for it was repeated.

The facts which the jury may have found, namely, that McKinnon, after he had said he did not want to buy clothes, but only to procure a loan on his coat, was immediately invited into the store, and was asked how much he wanted on it, that the coat was received on pawn, and all without any hesitation on the part of the defendants or any statement that pawnbroking was not a part of their business, and that when McKinnon asked for a ticket he was told, not that they were not pawnbrokers, but that they did not give tickets on overcoats, were all circumstances which, taken in connection with the nature of the business which the defendants were licensed to carry on, indicated that the defendants had concluded to carry on the business of pawnbroking,

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had entered upon that business by procuring a place at which it could be carried on, had made rules (probably with a view to concealment) as to the issuing of tickets, were ready to negotiate for loans, and that this coat was received on pawn not as an isolated act but in the course of that business.

All the subsequent conduct of the defendants tends to confirm this view. McKinnon testified that when, two weeks later, he went to the store of the defendants for his coat, they denied that he ever had been there, and said "it must be next door"; that he went into the next store, but, not finding his overcoat, he returned to the defendant's store and was again told that he had never been there before. He then reported to the police, who found on the defendant's book a statement that McKinnon had "sold" them an overcoat on November 15, 1906. It appeared that the defendant had sold the coat. McKinnon's story, if believed, tended to show that the defendant was trying to conceal the act of pawnbroking as if he was guilty of a criminal act. The single act of receiving a coat in pawn may have been no crime, if unconnected with carrying on the business of pawnbroking, but the act was a dangerous piece of evidence of crime, if done in the course of such business.

In view of the considerations above stated, we are of opinion that there was evidence that at the time the overcoat was received the defendant had embarked upon the business of pawnbroking, that this coat was received in pawn, not as an isolated act unconnected with that business, but in the course and in pursuance of that business, and hence that he was carrying on that business.

The instructions requested, including the third, were rightfully refused. No exception was taken to the charge.

Among the cases where the law applicable to the question arising on these exceptions is discussed, see *Commonwealth* v. *Ober*, 12 Cush. 489, 496; *Commonwealth* v. *Farnum*, 114 Mass. 267; *Merced County* v. *Helm*, 102 Cal. 159; *Merritt* v. *State*, 19 Texas, App. 435; *O'Neill* v. *Sinclair*, 158 Ill. 525; *Smith* v. *Anderson*, 15 Ch. D. 247, 276. The statement of Lathrop, J., in *Commonwealth* v. *Morris*, 176 Mass. 19, that the offence alleged (in that case it was engaging in or carrying on the business of making certain loans) "must be proved by showing a number of distinct acts of

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the kind named in § 1," was said *alio intuitu*, and with reference to the facts of that case, and cannot be regarded as a general statement of the only way in which carrying on a business may be proved.

Exceptions overruled.

THOMAS F. PATTERSON *vs.* MARY P. PATTERSON.

Suffolk. November 18, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Husband and Wife. Superior Court. Marriage and Divorce. Jurisdiction. Equity Jurisdiction, Equitable replevin, In divorce proceedings. *Equity Pleading and Practice*, Decree.

A wife, with the knowledge and consent of her husband, signed in her own name with a dealer in furniture a lease or contract of conditional sale which purported to convey certain furniture to her, and caused the furniture to be delivered by the dealer to her at the house occupied as a home by her and her husband, where it was used by them jointly. The instalments due under the contract were paid to the dealer, sometimes by her and sometimes by her husband, such payments as she made being in part from funds given to her by her husband, in part from money received from the letting of rooms in the house they jointly occupied, and in part from money which she herself earned. Subsequently the husband procured a divorce from the wife and refused to deliver the property to her. *Held*, that, in a suit in equity brought by the wife to gain possession of the property, a finding that the property was hers, apart from her husband, would be warranted.

The Superior Court has no jurisdiction to entertain, in a divorce proceeding in which a husband is seeking a divorce on the ground of the wife's adultery, a petition by the wife seeking to compel the husband to deliver to her personal property which she alleges to be hers, but which he refuses to deliver to her and prevents her from reaching by process of replevin or other process of law.

The jurisdiction in equity in matters connected with libels for divorce when the course of proceeding is not specially prescribed, granted to the Superior Court by R. L. c. 152, § 29, includes only such controversies as are a part of, or incidental to, suits for divorce, and does not include a controversy between the libellant and the libellee in a divorce libel, involving the question as to which of them is entitled to certain personal property purchased by the wife in her own name with the knowledge and consent of her husband, used by them in their home and paid for from money of both of them, the dispute being one which has no direct connection with the proceedings for divorce nor with conditions resulting therefrom.

R. L. c. 152, § 23, which, although it gives to the Superior Court power, when a divorce has been granted to a husband on the ground of his wife's adultery, to make a provision from her sole and separate property for the maintenance of children in the custody of the husband and secures to her the remainder of her

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separate property, does not give the court jurisdiction to entertain a petition by the wife to compel the husband to deliver to her property which she alleges is hers but which he refuses to deliver to her.

In divorce proceedings in which a husband sought a divorce on the ground of adultery of his wife, the wife filed a petition seeking to compel the husband to deliver to her certain personal property, alleging that the property was hers, that he refused to deliver it to her and that she could not reach it by a process of replevin or other process of law. There was a joinder of issue and, after the husband had been granted a divorce, there was a reference to a master who found that the property was the wife's and that the husband should deliver it to her, and a decree of the Superior Court was made to that effect. On appeal by the respondent, it was *held*, that the decree should be reversed because the Superior Court in the divorce proceedings had no jurisdiction of the matter, but that the case should be remitted to the Superior Court to give the petitioner an opportunity to amend the petition into a bill in equity under R. L. c. 159, § 6.

PETITION, filed on December 19, 1906, by the libellee in a divorce proceeding begun on December 5, 1906, in the Superior Court for the county of Suffolk, seeking to compel the libellant to return to her certain specified personal property alleged to be hers but to be unlawfully detained and concealed by him so that it could not be reached to be taken by replevin or other process of law. The respondent filed an answer and the petitioner a replication.

The divorce proceedings, in which the petition was filed, were instituted by the husband, the respondent in the petition, he charging the libellee, petitioner herein, with adultery. A decree *nisi* was granted to the libellant on March 25, 1907.

On April 12, 1907, the petition was referred to a master, who filed a report in which he found that the allegations of the petition were sustained as to goods hereinafter referred to as purchased upon leases or contracts of conditional sale and as articles given to the petitioner by relatives and friends; but that, as to certain presents by the respondent to the petitioner, and as to a piano, the allegations of the petition were not sustained. The petitioner was satisfied with the report, but the respondent alleged exceptions which will hereinafter be referred to.

According to the findings of the master, while the petitioner and the respondent were living together as husband and wife, she, with his knowledge and approval, went to various business concerns who sold household furnishings on credit, selected various articles, signed in her own name with each dealer a lease or agreement of conditional sale made out to her, and had the

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goods delivered to her at the house occupied by herself and the petitioner. Both parties made payments under the agreements of conditional sale. Such payments as were made by the petitioner were made in part out of money given to her by the respondent each week out of his wages, in part from money which she herself earned, and in part from money which she received from letting rooms in the residence they occupied. Accordingly the master found and ruled as a matter of law, "that, in respect to all the articles of furniture which were purchased upon leases or agreements of conditional sale, credit was given to the petitioner and the legal title passed absolutely to and has since then remained and is now in her, and there is no evidence sufficient to rebut the presumption at law that, by knowing and permitting the said lease to be executed and delivered, and the furniture specified therein to be purchased and delivered in the name of the petitioner, the respondent intended to make a provision for the benefit of the petitioner in so far as payments were made either by the respondent personally out of his own earnings or by the petitioner personally out of money received from the respondent or from the letting of rooms in the residence of the said parties." The master also found, with regard to a second group of articles claimed by the petitioner, that they had been given to her at various times by relatives and friends and that they were her property.

The respondent filed several requests for rulings, objections and the following exceptions to the master's report:

1. To the refusal of the master to rule that, even though a wife who is living with her husband purchases furniture and necessaries in her own name, the husband is liable for them.

2. To the refusal of the master to rule that, as a matter of law, it is a presumption that a wife contracts for household furniture and necessaries for the home as the agent of the husband, and the burden of proof rests upon the party denying such agency.

3. To the refusal of the master to rule that the burden of proof was on the petitioner to prove that furniture and necessaries purchased for the home during the continuance of the marriage relation were purchased on her individual credit and paid for out of her individual earnings.

4. To the refusal of the master to rule that no effectual valid

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gift by a husband to a wife can be proved where the husband retained the beneficial use of the articles alleged to have been given.

5. To the refusal of the master to rule that, as a matter of law, no valid gift can be made direct from a husband to his wife except of articles of wearing apparel or personal adornment.

6. To the refusal of the master to rule that, as a matter of law, the husband may at any time during the continuance of the marriage relation take possession of and convert to his own use such personal property of the wife as is capable of being reduced to possession.

7. To the refusal of the master to rule that the possession of the furniture in dispute by the husband during the marriage relation and his claims of ownership of it and refusal to deliver up to the wife constituted a valid reduction of any interest the wife may have possessed to the possession of the husband and the petitioner cannot recover.

8. To the refusal of the master to rule that, upon all the allegations in this petition, as a matter of law, the petitioner being the wife of Thomas F. Patterson, cannot maintain the petition against him.

9. To the refusal of the Master to rule that, if the wife received money from her husband for the purpose of purchasing furniture or other household necessaries, it is a presumption of law that the furniture or household necessaries so purchased were paid for out of the funds supplied by the husband, and the burden of the proof is on the wife to establish actual payment out of her own funds in case she claims individual ownership.

10. To the refusal of the master to rule that the petitioner, in order to sustain the burden of proof to support her claim that she purchased the property in dispute with her own individual earnings, must show by affirmative proof that she applied her husband's funds faithfully to the purposes to which he gave them, and that none of his money was available or was used for the purchase of the property in dispute.

11. To the refusal of the master to rule that, at common law, the husband is the owner of household furniture and other fixtures incidental to the use and occupation of his home, and evidence as to whether he claimed or exercised authority over them

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is immaterial; but the petitioner, claiming a title in derogation of the husband's, must produce affirmative proof showing affirmatively that she claimed authority in them and that the husband assented to such claim.

12. To the refusal of the master to rule that evidence of property left in the home by the husband during a temporary quarrel and separation of two weeks' duration is immaterial and cannot be considered as evidence of ownership when a question of the title to the property is to be determined, the parties having resumed their marriage relation and lived together for four years after the temporary abandonment.

13. To the master's finding and ruling upon the facts set out in his report that the petitioner was the owner of the property purchased under leases or agreements of conditional sale, whereas, upon the facts reported, he should have found that the respondent was the owner of all or a part of said property.

14. To the master's ruling that, upon the facts found by him, it is "the presumption" at law that, by knowing and permitting the said leases to be executed and delivered and the furniture specified therein to be purchased and delivered in the name of the petitioner, the respondent intended to make a provision for the benefit of the petitioner.

15. To the refusal of the master to find and report that the petitioner spent more or less of her income on wearing apparel and other personal expenses.

The case was heard upon the master's report and the respondent's exception thereto by *Gaskill*, J., who overruled the exceptions, confirmed the report and directed the respondent to return to the petitioner the property to which the master had found she was entitled. The respondent appealed.

H. J. Jaquith, for the libellant, respondent.

P. G. Bolster, for the libellee, petitioner, submitted a brief.

KNOWLTON, C. J. Most of the defendant's exceptions to the master's report relate to the title to the property. Many of the important articles were claimed by the petitioner under leases in writing, which were also conditional sales, made to her by shopkeepers. The fact that these conveyances were made directly to her, in her name, with the knowledge and consent of her husband, with nothing to control or affect the legal presumption

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from such conveyances, except the fact that her husband furnished her a large part of the money to pay for the goods, while she furnished the rest, and the further fact that they were bought to be used and were used in the family, warranted, if it did not require the master's finding that they became the petitioner's separate property. *Edgerly* v. *Edgerly*, 112 Mass. 175. *Cormerais* v. *Wesselhoeft*, 114 Mass. 550. *McCowan* v. *Donaldson*, 128 Mass. 169. *Libby* v. *Chase*, 117 Mass. 105. The facts found by the master render immaterial or inapplicable most of the requests for rulings and the exceptions founded upon them which relate to this part of the property. The requests ignore the changes in our law wrought by the statutes giving married women rights to acquire and control property as if they were sole, except that they cannot contract with their husbands. These considerations dispose of the first, second, third, sixth, seventh, ninth, tenth, eleventh and fourteenth exceptions. The fourth and fifth exceptions, which relate to gifts from a husband to a wife, are inapplicable, as the master found that no such gifts were made. There is nothing in the report to which the twelfth exception is applicable. The thirteenth exception is covered by what we have said in reference to the others. The fifteenth is immaterial.

The important question in the case is raised by the appeal from the final decree, and perhaps by the eighth exception also. It relates to the jurisdiction of the court to grant relief on this petition. Upon the finding of the master that the property belongs to the petitioner, and the admission in the answer that it is held and detained by the respondent against her will, there is no doubt that a court of equity, upon a bill brought by the wife against her husband, might grant her relief. *Frankel* v. *Frankel*, 173 Mass. 214. *Lombard* v. *Morse*, 155 Mass. 136. This is a petition brought by the libellee against the libellant, in connection with proceedings in which a decree of divorce *nisi* on the ground of adultery has been entered in favor of the husband against the libellee. If the fact that libels for divorce are brought on the law side of the court, or the contention that this petition is not properly incidental to proceedings for divorce, leaves the court without jurisdiction to give relief in this form, it is competent for this court to reverse the decree and remit the case to

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the Superior Court, to give the petitioner an opportunity, if she is so advised, to move to amend the petition into a bill of equity, under the R. L. c. 159, § 6.

Under the R. L. c. 152, § 29, the Superior Court has jurisdiction in equity in matters connected with libels for divorce where the course of proceeding is not specially prescribed. But this jurisdiction includes only such controversies as are a part of, or incidental to, suits for divorce. It does not include disputes which have no direct connection with proceedings for divorce, or with conditions resulting from these proceedings.

The only provision under which it fairly can be contended that the court can proceed upon this petition, filed in a suit brought to obtain a divorce, is § 23 of this chapter. But this is not intended to apply to controversies between husband and wife in regard to the ownership of property. It enables the court to make a provision from a wife's sole and separate property for the maintenance of children in the custody of the husband, when a divorce has been granted on the ground of her adultery, and it secures to her the remainder of her separate property, which formerly enured to the benefit of her husband, after a divorce granted for this cause. We are of opinion that it gives the court no jurisdiction to act upon a petition like the present.

The decree must be reversed and the case remitted to the Superior Court, where it will be open to the petitioner to move to amend her petition into a bill in equity, if she is so advised.

Ordered accordingly.

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JOSEPH A. WHEELOCK & others *vs.* POSTAL TELEGRAPH CABLE COMPANY OF MASSACHUSETTS.

Suffolk. November 21, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Contract, Validity, Performance and breach, Waiver of condition. *Waiver. Negligence. Telegraph. Damages*, For failure to transmit telegraph message. *Statute.*

A condition, imposed by a telegraph company and made a part of its contract with the sender of a message, that the company shall "not be liable in any case" for mistakes in the transmission or delivery or for non-delivery of the message "where the claim is not presented in writing within sixty days after the filing of the message," is reasonable and valid.

In an action of contract or tort against a telegraph company for failure to deliver a message filed with it by the plaintiff in Boston on January 9 for delivery in Australia, it appeared that the defendant received the message subject to the condition, which was a part of its contract with the plaintiff, that it would not be liable upon any claim for damages resulting from non-delivery of the message "where the claim" was "not presented in writing within sixty days after the filing of the message"; that the plaintiff first learned of the non-delivery of the message on February 23 and immediately interviewed the defendant's general manager, seeking an explanation, and he wrote to the plaintiff the next day stating that he had instituted an investigation and that a full report would be "delayed some weeks." Ten days later a representative of the defendant tendered to the plaintiff the amount of tolls he had paid for the message and the tender was refused. On April 4 the defendant wrote the plaintiff a letter stating that "the full extent of" its liability was the tolls which the plaintiff had paid. Thereafter, for the first time, the plaintiff consulted counsel who sent to the defendant on April 12 a written claim for damages, to which the defendant replied on May 14, saying that it had never received any claim from the plaintiff but had received an oral complaint, and renewed the offer to return the tolls. On June 1, the defendant wrote the plaintiff's counsel stating that the plaintiff had no legal or equitable claim against the defendant beyond the amount of the tolls. *Held*, that there was evidence for the jury on the question whether the defendant had waived its right to rely on the condition in the contract limiting the time within which the plaintiff's claim should be presented in writing, as well as its right to rely on the provision to the same effect in R. L. c. 122, § 11, the provision in the statute being one which the defendant might waive since it was inserted solely for the benefit of telegraph companies.

Where a telegraph company, for an additional charge equal to one quarter of its regular rate, gives to a person desiring to send a message an opportunity of insuring correct transmission by having the message repeated, a limitation of liability for non-delivery of, or mistakes in the transmission or delivery of, the message, imposed by it as a condition upon which it will accept an unrepeated message and made a part of its contract with the sender of such message, is reasonable and precludes the sender from recovering damages for such non-delivery or mis-

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takes occurring by reason of negligence of the company which does not amount to wilful misconduct or gross negligence.

Whether anything less than a reckless and wanton disregard of known duties could be considered as amounting to the gross negligence which, on the part of a telegraph company, would render ineffectual a reasonable condition contained in its contract with the sender providing for a limitation of the liability for failure to transmit a message, *quaere*.

Evidence tending to show that a telegraph company, with whom was filed in Boston a message in cipher to be delivered in Australia, the company previously having been informed that the sender, a regular customer, was a wool merchant and was likely to suffer financial loss if his messages were not delivered properly, and the sender stating to the company's agent that the message in question was "very important and must be transmitted correctly," did not transmit the message beyond New York, is not sufficient to prove the gross negligence on the part of the company which is necessary to make ineffectual a valid limitation of its liability for non-delivery, which was made a part of its contract with the sender.

In an action of contract or tort against a telegraph company for failure to transmit a message delivered to it for transmission by the plaintiff under a contract limiting the liability of the defendant for errors in transmission or non-delivery of such a message, the defendant by the provisions of R. L. c. 122, § 11, is deprived of the defence of such limitation as to damages not exceeding $100.

The provisions of R. L. c. 122, § 11, with regard to the liability of a telegraph company for damages not exceeding one hundred dollars resulting from its negligence in the transmission of a message notwithstanding a limitation of liability in its contract with the sender, do not change the rule of the common law for estimating such damages, that, where there is nothing in the transaction with the sender to bring home to the company knowledge or information as to any particular damage which will be likely to result from a mistake in transmission of the message, the damages that can be recovered are only the expense of sending it.

At the trial of an action of contract or tort against a telegraph company for failure to transmit a message filed with it by the plaintiff in Boston for transmission to Australia, there was evidence tending to show that, at different times before the filing of the message by the plaintiff, he had informed the defendant that he was a wool merchant and that mistakes and delays in sending his messages would cause him financial loss. It further appeared that the defendant would insure correct delivery of any message by repeating the message on payment of an extra charge of one quarter of the original charge, that the message in question was an unrepeated message and was in cipher and that, at the time it was delivered to the defendant's agent, he was "cautioned" by the plaintiff "that it was very important and must be transmitted correctly." It was admitted that the message never was transmitted. *Held*, that there was nothing to show that the probability of special damages to the plaintiff as a result of a failure to transmit the message was within the contemplation of the parties when the message was received by the defendant for transmission, and that therefore the plaintiff was limited in his recovery to his expense in sending the message.

CONTRACT OR TORT, with two counts alleged to be for the same cause of action, the first being in contract and the second in tort, for failure of the defendant to transmit a cable message given

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to it by the plaintiffs in Boston for transmission to Australia. Writ in the Superior Court for the county of Suffolk dated June 4, 1906.

At the trial, which was before *Pierce*, J., upon the defendant's suggesting that, on all the evidence which the plaintiffs intended to offer, they would not be entitled to go to the jury, it was agreed that, for the sake of expediting matters, the plaintiffs should submit an offer of proof, which was done. Among the facts offered to be proved, besides those stated in the opinion, the plaintiffs offered to show that the man who on behalf of the defendant received the message in question "was cautioned by the plaintiffs' clerk [who delivered it to him] that it was very important . . . and must be transmitted correctly."

After the plaintiffs had submitted their offer of proof, the presiding judge ruled that they were not entitled to go to the jury, and ordered a verdict for the defendant, and the plaintiffs excepted.

R. G. Dodge, (*C. W. Blood* with him,) for the plaintiffs.

G. P. Wardner & C. H. Walker, for the defendant.

KNOWLTON, C. J. The plaintiffs delivered to the defendant a message for transmission to their agents in Australia. It failed to reach its destination, and this action was brought to recover damages suffered by the plaintiffs from this cause. The conditions on the back of the blank, subject to which the message was received, and the contract made by the defendant, were, in part, as follows: "To guard against mistakes or delays, the sender of a message should write it legibly and order it repeated, that is, telegraphed back to the sending station for comparison. For such repeating an additional charge of one-quarter the regular rate will be made. . . . It is agreed between the sender of the message on the face hereof and this company that said company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery or misdelivery of any unrepeated message beyond the amount of that portion of the charge which may or shall accrue to this company out of the amount received from the sender for this and the other companies by whose lines such message may pass to reach its destination, and that this company shall not be liable for mistakes in the transmission or delivery, or for non-delivery or misdelivery of any repeated message be-

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yond fifty times the extra sum received by this company from the sender, for repeating such message over its own lines. . . . This company shall not be liable in any case where the claim is not presented in writing within sixty days after the filing of the message." The message was delivered to the defendant for transmission on January 9, 1906, and it contained in cipher a direction to the plaintiffs' agents in Melbourne, Australia, to buy a quantity of wool. The agents had no knowledge of this message until on or about February 22, when they received from the plaintiffs a letter written on January 20 which contained a reference to the message. They immediately sent a message in cipher to the plaintiffs, which was received on February 23, of which the translation was as follows: "Have not received any telegram dated January 9, referring to your letter dated January 20." The plaintiffs, on February 23, sent their clerk to the defendant's office, and he saw the general manager and showed him the cablegram from the plaintiffs' agents, and told him how important it was to get their messages through, and asked for an explanation. Within a few days he called once or twice more to inquire about the matter, and was informed that nothing had been learned. Under date of February 23 the defendant's manager wrote the plaintiffs a letter, which, omitting the formal parts, was as follows: "We are investigating the service of your cablegram of January 9 to Scuiridae, Melbourne. This investigation is made through mail, and a full report of service will necessarily be delayed some weeks. The investigation will be most thorough, and the party at fault for any negligence that may be shown will be promptly reprimanded. We will communicate with you further immediately upon return of these papers." Ten days after this a representative of the defendant called at the plaintiffs' office and tendered one of the firm a sum equivalent to the cost of sending the message, stating that this was all the defendant would do, and asking for a receipt for the money. The plaintiffs refused to accept the money. No further communication was received from the defendant in regard to the matter until about April 4, 1906, when the defendant handed them a letter dated April 3, which had been written by the superintendent of the defendant's claim department to the defendant's general superintendent, which referred to the plaintiffs'

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complaint in regard to this cipher cablegram, and continued as follows: "Investigation shows that this message was promptly transmitted from originating station; but in view of the statement of the firm in Melbourne for whom it is said to have been intended that they did not receive it, the tolls may be refunded to the sender. This would be the full extent of the liability of the company in whose hands the failure may be shown to have occurred." Immediately afterwards the plaintiffs consulted counsel for the first time in regard to the matter. On April 12 they sent the defendant a written claim for damages growing out of the loss of the message. On May 14, 1906, the defendant sent to the plaintiffs' counsel a letter which had been written by its vice-president to its general superintendent, referring to the letter of the counsel in regard to the claim, and saying that the company had never received any claim from the plaintiffs, but had received an oral complaint about the cablegram. The letter went on to state the facts in regard to the receipt of the message for transmission, and the result of the investigation, and the offer of the defendant to refund the tolls to the senders. It ended with these words: "Of course we could not have favorably considered any other claim in the matter. Please advise the attorneys accordingly." On June 1, 1906, the defendant's vice-president wrote to the plaintiffs' counsel, saying that, as the plaintiffs had no legal or equitable claim against the company, and could not have against any other company, for any sum in excess of the tolls on the message, no claim could be entertained. This suit was brought on June 4, 1906.

The first question in the case relates to that part of the contract which relieves the company from liability "where the claim is not presented in writing within sixty days after the filing of the message." Such a stipulation is a reasonable provision for the protection of the company against stale claims, and for securing an opportunity to investigate claims founded on an alleged breach of contract, or any negligence, before the facts pass out of the memory of those who ought to know them. The validity of this kind of requirement has been sustained by a great weight of authority. *Grinnell* v. *Western Union Telegraph Co.* 113 Mass. 299, 307. *Primrose* v. *Western Union Telegraph Co.* 154 U. S. 1. *Young* v. *Western Union Telegraph Co.* 65 N. Y. 163

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Heiman v. *Western Union Telegraph Co.* 57 Wis. 562, 565. *Western Union Telegraph Co.* v. *Dougherty*, 54 Ark. 221, 223. *Wolf* v. *Western Union Telegraph Co.* 62 Penn. St. 83. *Russell* v. *Western Union Telegraph Co.* 57 Kans. 230. *Albers* v. *Western Union Telegraph Co.* 98 Iowa, 51. *Hill* v. *Western Union Telegraph Co.* 85 Ga. 425. *Cole* v. *Western Union Telegraph Co.* 33 Minn. 227. The decision in *Conrad* v. *Western Union Telegraph Co.* 162 Penn. St. 204, that such a condition was not reasonable in reference to a message sent from Philadelphia to Shang-Hai, is not in accordance with the general current of authority, and we are not inclined to follow it. Other cases relied on by the plaintiffs have held such a limitation to be inapplicable or unreasonable where the message was not delivered. Some of these were decided upon language different from that before us, and others upon grounds that are inconsistent with the decision in this Commonwealth. Such a limitation has express legislative sanction in the R. L. c. 122, § 11. We are of opinion that this is a reasonable provision which was binding upon the plaintiffs.

It is contended by the plaintiffs that this requirement was waived by the defendant. Questions like that which arise on this contention have often been considered in suits upon policies of insurance. There was a series of communications between the parties touching the subject, in all of which, from first to last, the defendant discussed the question of liability on its merits, and professed in the beginning to intend to deal with it, and finally to have dealt with it, in reference to rights created by other parts of the contract, apart from any question as to the formal presentation of a claim in writing. The defendant's conduct in regard to it was such as naturally to throw the plaintiffs off their guard, and it appears that they did not read this stipulation nor consult counsel about their claim until after the sixty days had expired. We think they naturally might infer from the defendant's conduct that the claim was to be considered and determined upon its merits, and that there was no intention to set up a formal or technical defence, founded on the time or manner of presenting the claim. We are of opinion that there was evidence for the jury on the question whether the defendant waived its right to rely upon this defence. *Walker* v. *Lanca-*

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shire Ins. Co. 188 Mass. 560. *Graves* v. *Washington Ins. Co.* 12 Allen, 391. *Searle* v. *Dwelling House Ins. Co.* 152 Mass. 263, 265. *Brown* v. *Henry*, 172 Mass. 559, 567. *Moore* v. *Wildey Casualty Co.* 176 Mass. 418. *Hill* v. *Western Union Telegraph Co.* 85 Ga. 425. *Hays* v. *Western Union Telegraph Co.* 70 S. C. 16. *Western Union Telegraph Co.* v. *Stratemeier*, 6 Ind. App. 125, 130.

It becomes necessary to consider the question of damages. By the terms of the contract there was a strict limitation of liability for damages for unrepeated messages, a greater liability being created by having a message repeated. The limitation of liability was reasonable and binding, in the absence of wilful misconduct or gross negligence on the part of the company. *Ellis* v. *American Telegraph Co.* 13 Allen, 226. *Redpath* v. *Western Union Telegraph Co.* 112 Mass. 71. *Grinnell* v. *Western Union Telegraph Co.* 113 Mass. 299. *Clement* v. *Western Union Telegraph Co.* 137 Mass. 463. *Primrose* v. *Western Union Telegraph Co.* 154 U. S. 1. Whether any kind of negligence less than a reckless and wanton disregard of known duties, such as is referred to in *Banks* v. *Braman*, 188 Mass. 367, and *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130, could be considered gross in such a sense as to nullify this provision, we have no occasion in this case to inquire. No evidence of gross negligence was introduced or offered at the trial.

This stipulation limiting liability would leave the plaintiffs with no claim beyond the amount paid for the transmission of the message if there were no statute touching the subject.

The first part of § 11 of the R. L. c. 122 is as follows: "A telegraph company shall be liable for damages to the amount of one hundred dollars actually caused by its negligence, or that of its agents, in transmitting, receiving or delivering telegraphic messages, and any limit of such liability by contract or regulation shall apply only to the damages in each case in excess of one hundred dollars; but no action therefor shall be maintained unless the claim is presented in writing to such company or its agent within sixty days after such right of action accrues." The plaintiffs having failed to present their claim in writing within sixty days after the right of action accrued, could not take advantage of this section, if there had been no waiver by the telegraph company; but as this part of the section is a provision

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solely for the benefit of the company, it might waive it, as it might waive a similar provision in the contract between the parties. The evidence already referred to can be availed of by the plaintiffs to establish their contention that there was a waiver of this requirement of the statute, as well as their similar contention that there was a waiver of the similar provision in the contract.

This statute deprives the defendant of its defence under the contract as to damages not exceeding $100. We must therefore consider whether the rule for estimating damages within this amount is different under the statute from that existing at common law. We are of opinion that it is not. The statute simply takes away the defence created by the contract as to damages not exceeding $100, and it leaves the rule for determining these damages unchanged. The liability is only for damages "actually caused by its negligence." The liability at common law is the same.

In a case like the present, where there is nothing in the transaction to bring home to the telegraph company knowledge or information of any particular damage which will be likely to result from a mistake in sending a message, or a failure to deliver it, the damages that can be recovered are only the expenses of sending it. To state the rule in more general terms, the damages to be recovered are only such as are the natural and proximate result of its conduct, and such as reasonably might have been expected to be within the contemplation of the parties when the contract was entered into as the probable result of a breach of it. *Baldwin* v. *United States Telegraph Co.* 45 N. Y. 744, 752. *Western Union Telegraph Co.* v. *Hall*, 124 U. S. 444, 456. *Primrose* v. *Western Union Telegraph Co.* 154 U. S. 1, 29. *Squire* v. *Western Union Telegraph Co.* 98 Mass. 232. *Swift River Co.* v. *Fitchburg Railroad*, 169 Mass. 326. *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298. *Hadley* v. *Baxendale*, 9 Exch. 341. 27 Am. & Eng. Encyc. of Law, (2d ed.) 1059, 1060, and cases in note. The general rule is stated clearly in the two cases above cited from the supreme court of the United States, in the last of which the review of the authorities by Mr. Justice Gray is very full and elaborate.

The plaintiffs contend that the information to the defendant's

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clerks and manager, at different times before the sending of this message, that the plaintiffs were wool merchants, and that mistakes and delays in sending messages would cause financial loss to the plaintiffs, and the "caution" that this message was very important and must be transmitted correctly would charge the defendant with knowledge of this cablegram, such that the loss that might result from the error or delay in transmitting it would be within the contemplation of the parties as a damage for which compensation should be made. But in this connection it is to be noticed that the plaintiffs sent the message without ordering it to be repeated, which, under the contract, would have greatly increased the defendant's liability at a small cost to themselves. A statement as to the importance of the plaintiffs' general business would indicate nothing as to a particular message. In such a business there would be some messages the non-delivery of which would cause the sender a large loss, while the non-delivery of some others would cause no loss. In a cipher message such as this was, with no statement of any of the facts, to which it related, but only information that it was very important, there would be nothing to show the nature or extent of the loss, if any, that would result from a non-delivery of it. In this particular the case is almost identical with *Primrose* v. *Western Union Telegraph Co.* 154 U. S. 1, and is covered by it. *Candee* v. *Western Union Telegraph Co.* 34 Wis. 471, involving the same question upon similar facts, is to the same effect. See also *Harvey* v. *Connecticut & Passumpsic Rivers Railroad*, 124 Mass. 421, 424; *Western Union Telegraph Co.* v. *Coggin*, 68 Fed. Rep. 137; *United States Telegraph Co.* v. *Gildersleve*, 29 Md. 232; *Cahn* v. *Western Union Telegraph Co.* 48 Fed. Rep. 810.

We are of opinion that, upon the evidence offered, there is nothing to show that the probability of special damages to the plaintiffs, as a result of a failure of the defendant to perform its contract or to do its duty, was within the contemplation of the parties when the message was received by the defendant for transmission. But the evidence offered would have warranted the jury in finding a liability for damages to the amount of the plaintiffs' expenses in sending the message.

Exceptions sustained.

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JAMES S. REARDON *vs.* JOSEPH CUMMINGS, administrator.

Middlesex. November 22, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Appeal. *Superior Court. Insolvent Estates of Deceased Persons.*

Since terms of court were abolished by St. 1885, c. 384, the first Monday in every month is the day for the entry of appeals in the Superior Court and the Supreme Judicial Court.

The provision of R. L. c. 142, § 12, that an appeal to the Superior Court or the Supreme Judicial Court by a creditor of an insolvent estate of a deceased person from a decision of commissioners reported to the Probate Court disallowing a claim in whole or in part shall be entered on the first Monday of the calendar month next succeeding the expiration of thirty days after the return of the commissioners, is complied with by an entry of the appeal, after giving the required notice, before the day designated by the statute, such premature entry when otherwise complete being treated as taking effect on the designated day.

When an appeal to the Superior Court by a creditor of an insolvent estate of a deceased person from a decision of commissioners reported to the Probate Court has been entered on the day designated by the statute after giving the required notice, if upon the entry of his appeal the creditor failed to file a statement in writing of his claim as required by R. L. c. 142, § 13, a judge of the Superior Court may permit him to file the statement at any time afterwards.

KNOWLTON, C. J. A creditor of an insolvent estate of a deceased person presented his claim before commissioners, and appealed from their report to the Probate Court disallowing a part of it. He duly claimed his appeal and gave proper notice thereof at the Probate Court as required by the R. L. c. 142, § 12. He entered his appeal in the Superior Court and paid the clerk the entry fee before the time for entry prescribed by this section. The first question before us is whether the appeal should have been dismissed because the entry was made too soon. This question has never before been considered by this court, although there have been decisions that the court has no jurisdiction to permit the entry of an appeal, or other suit, after the end of the term, while terms were held, or after the return day next following the day on which the case should have been entered, since terms were abolished. *Keenan* v. *Knight*, 9 Allen, 257. *Dudley* v. *Keith*, 153 Mass. 104. By the St. 1885, c. 384, terms ceased to be held, and the first Monday of each month was made a

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return day for writs and other processes, and for the entry of appeals in the Superior Court and the Supreme Judicial Court. With the exception of Sundays and legal holidays, the courts are open for business at all times.

In *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, the court said, referring to the rule forbidding entries after the return day next following the time prescribed for the entry: "It does not seem to us that the same strictness should be extended to entries made too soon, when the right to enter is outstanding and a proper entry could be made if the party had notice that the letter of the law was insisted upon."

In a case like the present, where the party has procured and furnished to the clerk the proper copies, and has paid the entry fee and has directed an entry before the day on which the statute provides that it shall be made, and the clerk makes an entry, so that on the appointed day everything has been done and the record shows that everything has been done that ought to be done to make a proper entry on that day, we are of opinion that the entry should be treated as made on that day within the meaning of this statute. That which has been done prematurely, which appears of record in perfect form for an entry on that day, except that it was done sooner than was required, should be treated as taking effect on that day. We are of opinion that the appellant from the Superior Court could not complain that the appeal from the decision of the commissioners was not properly entered in that court.

Under the R. L. c. 142, § 13, the appellant from the decision of the commissioners should have filed "a statement in writing of his claim, setting forth briefly and distinctly all the material facts which would be necessary in a declaration for the same cause of action." He failed to do this, and was permitted upon motion in the Superior Court to do it afterwards. From the order allowing this motion the administrator appealed.

Formerly in Massachusetts a court had no power to allow the filing of a declaration if the writ contained none. This was because such writs purported to authorize an attachment of property or an arrest of the person, and, without a statement of a cause of action, the writ brought no subject within the jurisdiction of the court for its action. Statutes have been passed au-

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thorizing the filing of the declaration in most cases on or before the return day, and giving the court jurisdiction to permit the filing of it at any time before the next regular return day. Gen. Sts. c. 129, §§ 7, 8, 9. Pub. Sts. c. 167, §§ 7, 8, 9. R. L. c. 173, § 11. As these provisions are statutory, and as they do not include statements to be filed in appeals like that before us, it is contended that the original rule of the common law should be applied, and that the court had no jurisdiction to permit the filing of the statement at a later stage of the case. This contention overlooks a material difference between the two classes of cases. In ordinary actions, before these statutes were passed, the court had no jurisdiction of any claim, because the writ contained no statement of the subject to which it was intended to relate. There was nothing before the court upon which jurisdiction could be exercised or an amendment predicated. That is the reason for the decisions in *Brigham* v. *Este*, 2 Pick. 420; *Rathbone* v. *Rathbone*, 5 Pick. 221, and *Guilford* v. *Adams*, 19 Pick. 376.

In an appeal from a decision reported by commissioners to receive claims against the insolvent estate of a deceased person, their report contains a general, although commonly an informal, statement of the claim, and this is a part of the record that is taken to the Superior Court. The statement to be filed is in the nature of an amendment of that which is informal and incomplete. The appeal, with the record, gives jurisdiction of the subject matter to the Superior Court, and at any time it may allow any proper amendment of the claim, either in the form of a new declaration, or of an original statement or declaration, if the appellant fails to file the statement seasonably.

Judgment allowing the claim upon the finding of the judge.

J. Cummings, pro se.

F. W. Dallinger, (*E. A. Counihan, Jr.*, with him,) for the plaintiff.

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FREDERICK L. CUTTING *vs.* AMERICAN INSURANCE COMPANY.

Suffolk. December 3, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Insurance. Insolvency. Corporation. Words, "Net assets," "Claims for losses."

Upon an information by the insurance commissioner under R. L. c. 118, § 7, against a domestic insurance company praying for the appointment of a receiver to take possession of the property of the company and to settle its affairs, where it appears that at the date of the filing of the information the assets of the company exceeded its liabilities by about $40,000 if claims of $300,000 against the company were disregarded, and that these claims were based upon the alleged invalidity of a settlement which the company regarded as final but which was disputed by the policy holders with whom it was made, a master is not justified in finding that the defendant is solvent, a company with outstanding disputed claims exceeding its assets being insolvent as matter of law for the purpose of proceedings under the statute, according to the rule prescribed by R. L. c. 118, § 1, (re-enacted in St. 1907, c. 576, § 1,) requiring the "net assets" of an insurance company to be ascertained after deducting all "claims for losses."

Under R. L. c. 118, § 7, which provides that if the insurance commissioner, upon examination, is of opinion that any domestic insurance company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to its policy holders, he shall apply to the Supreme Judicial Court for an injunction restraining it in whole or in part from "further proceeding with its business," if it appears upon an information filed by the insurance commissioner that the defendant is insolvent for the purpose of this proceeding, having outstanding against it disputed claims exceeding its assets, and if the defendant consents to the issuing of an injunction against its writing new policies, a master is not justified in finding that the defendant's condition is not such as to render its further proceedings for the purpose of winding up its affairs hazardous to the policy holders, because the immediate settlement in full of the claims of some of the policy holders would be hazardous to the others, and the payment of losses constitutes an important part of the insurance business; and an absolute injunction should issue.

HAMMOND, J. This is an information brought by the insurance commissioner under the provisions of R. L. c. 118, § 7, against a domestic insurance company, in which the informant states that he is of opinion that the company is insolvent and that its condition is such as to render its further proceedings hazardous to its policy holders and to the public. The defendant filed an answer denying that it was insolvent or that its condition was such as to render its further proceedings hazardous to its policy

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holders or to the public, and averring that it was "no longer proceeding with its business as an insurance company, and had long since ceased to write or issue policies of insurance."

The case was heard by a single justice * of this court upon the informant's exceptions to the master's report and the defendant's motion for further modification of the interlocutory injunction which had been theretofore issued. The justice sustained the fourth and the eighth of the informant's exceptions, overruled all the others, denied the defendant's motion for a modification of the injunction, and ordered the injunction to be made perpetual and receivers to be appointed; and then reserved the case for the full court upon the pleadings, the master's report, the informant's exceptions † and the defendant's motion.

The fourth exception raises the question whether the master's finding that the defendant was not insolvent is correct. Upon the theory adopted by the master the excess of assets over liabilities on November 16, 1906, the date of the filing of the information, was $39,291.55, and on January 31, 1907 (the date agreed upon by the parties as convenient for a computation of the assets and liabilities in case the financial condition should be considered as of some day since the information was filed), was $31,052.78.

In reaching this result the master disregarded a class of claims aggregating over $300,000. If these claims are to be upon the debit side of the account, then it is plain that the master's con-

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* *Sheldon*, J.

† The reasons set forth for the informant's fourth exception were as follows: "For that the master has found that the defendant is solvent. The evidence shows that there are outstanding in the hands of Boston attorneys about one hundred and twelve claims against the defendant, aggregating over $300,000, which claims are those of policy holders of the defendant, who allege that they were induced to compromise their claims against it by the false representations made to them by one of its authorized agents. The informant contends that these claims should be considered as contingent liabilities in ascertaining the solvency of the company, and that if this is done the company is clearly insolvent. The master has disregarded these claims in estimating the defendant's liabilities, and the informant objects to this action and ruling of the master."

The reasons set forth for the informant's eighth exception were as follows: "For that the master found and ruled that upon all the evidence the defendant's condition is not such as to render its further proceedings for the purpose of winding up its affairs hazardous to its policy holders."

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clusion is wrong and the exception must be sustained. As to this matter the master reports that as a result of the great fire in San Francisco of April, 1906, "about five hundred and eighty claims, aggregating in amount about eleven hundred thousand dollars were made against the respondent; that all but about seventy of these had been compromised and settled on November 16, 1906, and that all but about sixty had been settled on January 31, 1907. Most of these settlements were made on the basis of forty per cent of the face of the policy. In some cases, however, the defendant paid larger amounts (in one case as much as ninety per cent of the face of the claim), because it considered it expedient to placate certain claimants." He further finds, if the facts are in any way material, as follows: "There are also in the hands of attorneys in Boston about one hundred and twelve claims against the defendant, aggregating over three hundred thousand dollars. These are claims of policy holders in California, who allege that settlements made by them with the defendant, under which they received forty per cent of the amount of their claims, were obtained by the false representations of an agent of the defendant. The claims, or many of them, were solicited by attorneys in California (but not by those in Boston) who agreed to pay the expenses of enforcing them in consideration of agreements by the claimants to pay said attorneys one half the amounts recovered. No suits have yet been brought on these claims. The informant offered to prove that agents or officers of the defendant, after the San Francisco fire, made false statements as to the defendant's financial condition, for the purpose of inducing policy holders in San Francisco to accept less than the amounts due them under their policies, and that certain policy holders relied and acted upon said statements. I excluded such evidence, except so far as it tended to show admissions of insolvency by authorized agents of the defendant, as being immaterial to the issues before me under the terms of the order of reference and the memorandum of decision therein referred to. I therefore make no finding as to the validity of the above claims."

It is not explicitly stated in the report whether these claims in the hands of the Boston attorneys are included in the five hundred claims aggregating $1,100,000 previously mentioned in

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the report as, with a few exceptions, compromised and settled. That question however is immaterial, because, even if they are included, it is plain that so far as respects these latter claims the finding that they have been compromised and settled must be taken subject to the modification contained in the subsequent finding that these policy holders contest the validity of the settlements on the ground of fraud practised by the respondent and its agents. Shortly stated, the master has found that there are claims aggregating $300,000, which the defendant contends have been settled, but the validity of the settlement is disputed by the policy holders. It is clear that if the validity of the claims in the hands of the Boston attorneys should be finally established to the extent of even one-seventh of the amount claimed, there would be a substantial excess of liabilities over assets.

In his investigation as to the solvency of the company the master was thus confronted with these disputed claims. They are claims made by the policy holders for indemnity for losses suffered. Upon these policies a certain amount had been paid by the defendant. What was the master to do? Manifestly he could not try and determine finally the validity of each claim and the true amount thereof. Such would not only have been impracticable, but it would have been absolutely useless, because even if it had assumed to try and determine any claim, his conclusion would not only have settled nothing as between the insurer and the insured, but would not have been even evidence on that question in a suit between them on the policy. And yet it is plain that it hardly would be safe to ignore the existence of these claims as having no bearing whatever upon the financial condition of the defendant. The action upon each claim when brought would be upon the policy, and unless the validity of the settlement should be sustained the plaintiff would be likely to recover. They were claims for losses.

It is strongly urged by the defendant that the burden of proving insolvency is upon him who affirms it; that the claims of which we are speaking cannot properly be called the claims of policy holders at all, but rather are claims made by persons who were formerly policy holders who have settled their claims under the policies formerly held by them, and that "the issue is not

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whether certain persons intend to present claims as to which the record shows compromise settlements but what liabilities actually exist," and that the same principle would apply even if the claims "had reached the status of suits of law at the time of hearing."

The question whether an insurance company is insolvent is frequently attended with great difficulty, and where upon the facts the question is close it cannot ordinarily be definitely solved until after the lapse of considerable time. Without considering the degree of precision to which the evidence must go in other proceedings in order to establish the fact of insolvency, we are of opinion that for the purpose of a proceeding such as this under the statute the Legislature has provided a plain, practical working rule for our guidance. R. L. c. 118, § 1, (re-enacted in St. 1907, c. 576, § 1,) reads as follows: "'Net assets' means the fund of an insurance company available for the payment of its obligations in this Commonwealth, . . . after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts and liabilities inclusive of policy liability and exclusive of capital." "Claims for losses" is a very broad term and must be considered as including all claims, as well those which finally shall turn out to be invalid as those which finally shall turn out to be valid. Whenever the insurance commissioner finds that by applying the statute rule any insurance company is deficient in assets for the payment of its obligations, he is justified in proceeding against it as insolvent, and the proof of such a state of things is sufficient proof of the insolvency of the company for the purposes of this proceeding.

Applying this rule to the facts stated in the master's report, it is seen that the insolvency of the defendant is amply shown; and the fourth exception must be sustained.

The master "finds and rules that the defendant's condition was not such as to render its further proceedings for the purpose of winding up its affairs hazardous to the policy holders," and the eighth exception raises the question whether this is correct. As to this it is to be observed that the defendant through its counsel announced to the master at the hearing that it did not intend or desire to proceed with its business in the sense of

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writing new policies or of entering into any new obligations except for the purpose of winding up its business and paying its obligations as they matured; and that it was willing to make a stipulation to that effect and to be enjoined from so proceeding. At the argument before us we understand the defendant to take the same position. Consequently the question as to hazard to the public as distinguished from its present policy holders is not before us.

It is strongly contended by the defendant that even if it is insolvent there can be no hazard to its policy holders. But we cannot accede to that view. The defendant desires to go on and settle losses. It is plain that if the defendant does this and pays the losses as fast as judgments are obtained against it or settlements are made, as it desires to do, then in case of insolvency those claimants who last get judgments or last agree upon the amount due will fail to have their claims paid. To allow the defendant to continue to dispose of the assets in this way would be a proceeding hazardous at least to some of the policy holders.

Lastly, it is contended that even if it be insolvent, and even if its further proceedings are hazardous to the policy holders, nevertheless the only injunction that can be issued is against its further proceeding with its business, that is with new business; that the only new business is the issuing of policies; and that inasmuch as it does not propose to issue new policies but only to settle losses on policies already issued, no injunction should issue. This position is untenable. The insurance business, perhaps the most important part of it, especially when considered from the standpoint of the policy holders, includes the payment of losses as well as the issuing of contracts, and the statute should be construed to extend to the prohibition of any part of the business the carrying on of which would be hazardous to its present policy holders. The decision sustaining this exception was correct.

It becomes unnecessary to consider the other exceptions.

Decree affirmed.

H. Parker & E. K. Arnold, for the defendant.

D. Malone, Attorney General, *& J. F. Curtis*, Assistant Attorney General, for the plaintiff.

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McARTHUR BROTHERS COMPANY *vs.* COMMONWEALTH.

Suffolk. December 5, 6, 1907. — January 1, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Commonwealth. Auditor. Superior Court. Statute. Words, "Hearing," "In open court."

Under R. L. c. 201, as amended by St. 1905, c. 370, giving the Superior Court "jurisdiction of all claims at law or in equity against the Commonwealth," which provides that such cases "shall be tried by the court without a jury and, if the amount claimed is more than $2,000, by three justices of said court," and that "all hearings shall be in open court," there is no authority to appoint an auditor.

PETITION, filed on July 18, 1906, under R. L. c. 201, as amended by St. 1905, c. 370, to enforce a claim against the Commonwealth for damages for the alleged breach of a contract made in behalf of the Commonwealth by the metropolitan water and sewerage board, the amount claimed being $400,000.

In the Superior Court the petitioner made a motion before *Sanderson*, J., for the appointment of an auditor. The motion was opposed by the respondent on the ground, among others, that the court had no authority to appoint an auditor. The judge made an order allowing the motion. The respondent excepted and also appealed.

Upon the request of the Attorney General, who stated that in his opinion the order made by the judge ought to be determined by the full court before any further proceedings were taken in the trial court, the judge, being also of that opinion, reported the case upon the petitioner's motion and his order thereon and the respondent's exception and appeal for determination by this court.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, (*A. Marshall*, Assistant Attorney General with them,) for the Commonwealth.

C. F. Choate, Jr., for the petitioner.

RUGG, J. This is a petition brought against the Commonwealth for damages alleged to have been suffered by the petitioner by reason of breaches, committed by the Commonwealth, acting through the metropolitan water and sewerage board, of

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contracts made by him with it. The aggregate of the sums demanded, as set forth in the petitioner's statement of claim, is about $390,000. The single question presented is whether an auditor can be appointed.

It is fundamental that under our jurisprudence the sovereign power cannot be impleaded in its own courts except by its consent, and then only in the precise manner and to the exactly limited extent, which may be pointed out in the terms in which the consent is expressed. Such consent can be granted only by the Legislature, for our Constitution contains no provision touching the subject. *Troy & Greenfield Railroad* v. *Commonwealth*, 127 Mass. 43. *Wesson* v. *Commonwealth*, 144 Mass. 60. *Hodgdon* v. *Haverhill*, 193 Mass. 406.

The first general law by which jurisdiction was conferred upon the courts to adjudicate upon claims against the Commonwealth was St. 1879, § 255. Before this act the only relief open to those who had suffered damage by dealings with the representatives of the Commonwealth was by petition to the Legislature. This act, which was substantially embodied in Pub. Sts. c. 195, gave cognizance only of claims "founded on contract for the payment of money," or upon §§ 98 and 116 of c. 63 of Gen. Sts., the latter provisions referring to the management of railroads. The act was discussed in *Wesson* v. *Commonwealth*, 144 Mass. 60, which held that under its terms damages could not be recovered for breach of a contract, because this was not a claim for the payment of money by the Commonwealth. *Milford* v. *Commonwealth*, 144 Mass. 64, determined that the statute did not authorize the recovery of expenses incurred by a town for the support of a State pauper, for the reason that the obligation to make reimbursement for such expenses did not arise out of contract, but was imposed by the terms of Pub. Sts. c. 86, §§ 25, 26. The Legislature in session when these two decisions were announced enacted St. 1887, c. 246, which extended the jurisdiction of the court to all claims "at law or in equity" with certain exceptions not here essential. *Murdock Parlor Grate Co.* v. *Commonwealth*, 152 Mass. 28, was then decided, which held that although the statute as amended covered claims like those excluded in *Milford* v. *Commonwealth* and *Wesson* v. *Commonwealth*, it did not include those for the misfeasance or negligence of agents of the

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Commonwealth in the performance of their duties. The other cases which have arisen under this statute, *Nash* v. *Commonwealth*, 174 Mass. 335; *S. C.* 182 Mass. 12, *Flagg* v. *Bradford*, 181 Mass. 315, *Kennedy* v. *Commonwealth*, 182 Mass. 480, and *National Contracting Co.* v. *Commonwealth*, 183 Mass. 89, afford no aid as to the question now presented.

The statute under which this petition is brought, and by which the conduct of the cause must be governed, is R. L. c. 201 as amended by St. 1905, c. 370. Section one confers upon the Superior Court jurisdiction of all claims at law or in equity against the Commonwealth. It is first to be noted that the Superior Court alone is given original jurisdiction. This has been the tribunal designated in all the statutes, although until St. 1905, c. 263, other litigants having claims in contract or replevin of more than $1,000, or within Suffolk County of more than $4,000, had the option of bringing their litigation either in the Supreme Judicial Court or the Superior Court, and in most matters in equity there is now concurrent jurisdiction. While many statutes have conferred exclusive jurisdiction upon the Supreme Judicial Court, this one constitutes the Superior Court, which is the great trial court of the Commonwealth, the exclusive tribunal for trials of this class of causes. It is also provided that the claim shall be enforced only by a petition, not by the ordinary process of writ or bill in equity open to all other suitors in the courts. The petition shall contain a brief statement of the nature of the claim. This is something more than a mere matter of procedure; it is an altogether new form of relief for causes which had theretofore been remediless. The word "petition" is here used in a sense quite different from that in which it was employed in St. 1887, c. 383. *Worthington* v. *Waring*, 157 Mass. 421. The second section makes applicable to such a petition all "provisions of law relative to tender, offer of judgment, set-off and recoupment." The express reference to these particular incidents in the progress of a proceeding in court indicates an intention to make inapplicable other ordinary incidents, which are omitted, under the familiar principle of interpretation that express mention of one matter excludes by implication other similar matters not mentioned. It is further provided that there shall be no trial by jury, but that the hearing shall be had before

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the court, and if the amount claimed is more than $2,000, before three justices. The petition must be brought in Suffolk County unless the amount claimed is $2,000 or less, in which event it may at the option of the petitioner be brought in the county of his residence. All these provisions indicate a plain intent on the part of the Legislature to provide a special form of procedure with unusual limitations. It is with this in mind that we approach the interpretation of the clause in the statute which states that "all hearings shall be in open court."

"Hearing" is technically applicable to proceedings in chancery, *Babcock* v. *Wolf*, 70 Iowa, 676, 679, *Miller* v. *Tobin*, 18 Fed. Rep. 609, 616, and is used in contradistinction to trial which is properly applicable to actions at law: but in modern usage no doubt the two words sometimes overlap in meaning. Final hearing is sometimes used to describe that stage of the proceedings which relates to the determination of the suit upon its merits as distinguished from preliminary questions, which are termed interlocutory. *Galpin* v. *Critchlow*, 112 Mass. 339. *Akerly* v. *Vilas*, 24 Wis. 165. *Joseph Dry Goods Co.* v. *Hecht*, 120 Fed. Rep. 760. *Hess* v. *Reynolds*, 113 U. S. 73. *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464. But, hearing is frequently and perhaps commonly used in a broader and more popular significance to describe whatever takes place before magistrates clothed with and exercising judicial functions and sitting without jury at any stage of a proceeding subsequent to its inception. *United States* v. *Patterson*, 150 U. S. 65. In our statutes, trial and hearing are used indifferently to describe what occurs before an auditor. R. L. c. 165, §§ 55, 56, 59; c. 173, § 81. St. 1900, c. 418. Hearing appears to have been treated as the accurate designation of proceedings before an auditor in *Carpenter* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98. See *Worcester* v. *Lakeside Manuf. Co.* 174 Mass. 299. Therefore, although the report of an auditor strictly becomes only *prima facie* evidence, the proceedings before an auditor are of greater dignity than the mere taking of depositions and may properly be termed hearings. But as all hearings provided for in the statute under discussion must be had in open court, it follows that there can be no hearings before auditors, for plainly an auditor is not the court, but an officer appointed by the court.

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It would be natural to construe a requirement that all hearing should be "in open court" as meaning that all steps in the progress of the case shall be before the justice or justices constituting, for the time being, and convened for the purpose of organizing, the court, formally opened at a legally designated time and place, with the attendance of officers necessary for the proper transaction of its functions, prepared for the performance of judicial duties in the administration of justice. This has been substantially the interpretation given, when the words have been employed in statutes in other jurisdictions touching common subjects of litigation between ordinary parties. *Kenyon* v. *Eastwood*, 57 L. J. (N. S.) Q. B. D. 455. *Hobart* v. *Hobart*, 45 Iowa, 501, 504. *Conover* v. *Bird*, 27 Vroom, 228. *Ford* v. *Parr*, 2 Wils. 21. *Woolley* v. *Whitby*, 2 B. & C. 580. *Suesemilch* v. *Suesemilch*, 43 Ill. App. 573. The argument is much stronger for giving to these words a strict and accurate construction in a statute, by which the Commonwealth is suffering itself to be brought to the bar of its own courts at the instance of everybody who has a claim against it, and stating in distinct but limited terms the conditions upon which it may be impleaded.

The statute taken as a whole indicates an intent on the part of the Legislature to create a special tribunal composed of trained and experienced judicial servants, sitting, when large amounts are involved, in the capital of the State, to deal with this peculiarly important class of claims, which is not comprehended within any general classification of actions, under an unusual form of procedure. Under such circumstances only those incidents of ordinary practice, which are expressly set forth or follow by necessary implication, attach to the procedure. An auditor is not one of the inherently necessary implications of every procedure in court and is not authorized under this statute. The authority of courts to appoint auditors is largely created by statute, although the practice of referring certain matters to them is ancient. *Holmes* v. *Hunt*, 122 Mass. 505. *Holmes* v. *Turners Falls Co.* 150 Mass. 535. The appointment of an auditor is incompatible with some of the terms of the statute, as has been pointed out, and is inconsistent with its general purpose. Arguments based upon a sound public policy can be adduced in favor of not permitting the interests of sovereignty to be passed upon

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by any tribunal save the court itself, so that it cannot be inferred that there was any legislative oversight as to a mere incident of practice. Nor is it unprecedented that three justices of the superior bench should constitute the court for the trial of causes. R. L. c. 157, § 5. This conclusion is confirmed by a comparison with other statutes, which authorize proceedings against the Commonwealth. R. L. c. 14, § 67, as amended by St. 1906, c. 349, and St. 1908, c. 437, § 84, touching recovery of an illegally exacted corporation tax, make no such detailed provision as to the form of procedure and require conformance to proceedings in equity. So also the statutes as to the metropolitan park, sewerage and water systems, as far as they relate to the taking of property by eminent domain, simply adopt existing methods for the determination of damages without creating any special machinery or tribunal. St. 1893, c. 407, § 7. St. 1889, c. 439, § 4. St. 1895, c. 488, § 13. The contrast between these enactments and R. L. c. 201 and its amendments is significantly divergent in almost all aspects. It is also to be noted that in other instances, when the Legislature has created a new remedy or constituted a new tribunal, or granted damages not required by the constitution, and has intended to clothe the courts with power to appoint auditors or equivalent officers, it has often made express provision therefor. Tax abatements, St. 1890, c. 127, § 5 (R. L. c. 12, § 80). Grade crossing abolition, St. 1890, c. 428, § 7 (St. 1906, c. 463, Part I. § 39). *Newton, petitioner*, 172 Mass. 5. Insurance assessments, St. 1862, c. 181, § 2 (St. 1907, c. 576, § 51). *Commonwealth* v. *Mechanics Ins. Co.* 112 Mass. 192. Business damages, St. 1895, c. 488, § 15. *Sawyer* v. *Metropolitan Water Board*, 178 Mass. 267. *Sawyer* v. *Commonwealth*, 182 Mass. 245. Land damage cases, St. 1876, c. 22. St. 1894, c. 175. R. L. c. 48, § 109. St. 1871, c. 361, § 3. While too much importance is not to be attached to these statutes, they are perhaps evidence of a legislative belief that without such express provision, there was no authority for the appointment of an auditor, and they lend significance to the omission of such provision in the statute under consideration.

The order allowing the motion for the auditor should be reversed and the motion disallowed, and it is

So ordered.

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SETH T. THACHER *vs.* ELIZABETH D. WESTON.

Essex. November 7, 1907. — January 2, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Contract, Performance and breach. *Option. Realty.*

One, who has an option to purchase certain real estate by the payment of a price named before a certain day, does not give notice of his election to purchase the real estate under the option by advertising it to be sold by him at auction at a date three days before the option expires.

One who holds an instrument in writing signed by the owner of certain real estate, giving him the option to purchase it by the payment of a price named before a certain day, has no interest in the real estate until he has elected to purchase it and has given notice of such election.

TORT OR CONTRACT, with a declaration as stated below. Writ dated January 3, 1907.

The plaintiff's amended declaration alleged

That the defendant made with the plaintiff a contract in writing as follows:

"April 14, 1902.

"In consideration of Twenty-five Dollars ($25.00), the receipt of which I hereby acknowledge, I hereby agree to sell to Seth T. Thatcher for the sum of Ten Thousand Dollars ($10,000), the estate on the westerly side of Cabot street, situated between Federal and Pond streets.

"This agreement to be null and void on or after January 1, 1903.

"Mrs. Elizabeth D. Weston."

That on or before the thirty-first day of December, 1902, and within the time allowed by the terms of the contract, the plaintiff exercised his rights thereunder to purchase the property, and in accordance therewith the defendant conveyed to the appointee of the plaintiff the above described property for the consideration of the sum and payment of $10,000, and has done all things which were to be done to complete the transaction. That by the implied conditions and terms of the contract the defendant agreed and covenanted with the plaintiff that she would always

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hold herself in readiness to perform the contract and convey the property when called upon to do so and when tendered the purchase price by the plaintiff, and that she would refrain from the commission of any act which would prejudice or defeat the plaintiff in any way, or deprive him of the full benefit and enjoyment of his rights thereunder. That in pursuance of and in the exercise of the legal rights which the plaintiff acquired by virtue of the contract, the plaintiff advertised extensively and at great expense in the Beverly Evening Times the property for sale by auction on the twenty-ninth day of December, 1902, it being two days before the contract became void by its terms.

That, being charged with full knowledge of the legal rights which the plaintiff acquired under the contract and that the plaintiff purposed and intended to sell the property and for a profit, the defendant, in violation of the conditions and duties which the defendant owed to the plaintiff, committed the following acts in breach of said contract, viz.:

On the twenty-ninth day of December, 1902, when large numbers of people were present at the auction sale as appointed, in response to the plaintiff's advertisements, and as a result of his efforts, one Boyden, acting as agent and attorney and under the authority of the defendant Weston, being present, called the attendants together and read to them, in their hearing, a certain document, and made a certain declaration to them, a copy of which is as follows:

"In connection with the proposed sale of the Weston Real Estate, on the westerly side of Cabot street, Beverly, numbered 260–264, I wish to say on behalf of Mrs. Elizabeth Weston that she did not authorize the statement made a little while ago in the Beverly Times that this property had changed hands; that such a statement was in fact false; that she has not authorized the recent advertisements announcing the auction sale of that property, and does not now consent to the sale; that she has been and is to-day the sole owner of the real estate advertised to be sold.

"Further, upon a Bill of Complaint filed to-day by Mrs. Weston, an Order of Notice was granted this morning by Judge Wait of the Superior Court summoning S. Tracy Thacher before his Court tomorrow, at four o'clock, to show why an injunc-

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tion should not be issued by that Court forbidding such a sale as this; that due service of this Order of Notice has been made on Mr. Thacher, and both he and any intending purchaser are hereby notified of Mrs. Weston's Bill of Complaint asking an injunction, and the Order of Notice issued on the same.

"So far as Mrs. Weston is aware, the only claim of interest in this property by Mr. Thacher, or any one except herself, is a document by which Mr. Thacher may claim to hold an option of purchase. This document was drawn up wholly by Mrs. Weston, who has had no legal education or training, and is ignorant of the technical details necessary to make an agreement for the sale of land valid and binding. Mrs. Weston does not admit that this agreement is legally binding, and in this connection states that Mr. Thacher has persistently refused to allow her, by her agent, to examine the copy which is in his possession, and is the only copy.

"Mrs. Weston hereby announces that she reserves all her rights of any sort in connection with this property; that she will not convey the same unless legally bound to do so, and that any purchaser here buys at his peril, with due notice of the facts stated."

That Boyden, acting as agent and attorney of the defendant, expelled the attendants at the auction sale from the sidewalk in front of the premises, and pursuant to his demands the auction sale was held across the street.

And the plaintiff further says that there were a large number of people present at the auction sale who were prepared to bid on the property and to buy it for a large sum of money, and were prepared to bid on the property and to buy it for a much larger sum of money than the amount of the purchase price as stated in the contract, and for a much larger price than the actual amount of the selling price. That in order to protect the plaintiff from a loss the property was bid in at the request of the plaintiff for the sum of $11,300, the property being sold therefor, at a large sacrifice, for several thousand dollars less than its actual worth and value; and for much less than it would have sold for had it not been for the acts of the defendant. That because of these acts contrary to the implied terms and conditions of the contract, the plaintiff's benefits and profits were

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greatly injured, reduced and diminished to the value of several thousand dollars.

The defendant demurred to the declaration, and as causes of demurrer alleged the following:

1. It does not appear in the declaration that the plaintiff had any right in the premises which was infringed.

2. It does not appear in the declaration that the plaintiff had any title to or ownership in the property therein described, of which he held himself to be owner, and which he advertised for sale as therein described, and he was therefore not injured by the alleged inadequacy of price at said sale.

3. No contract on the part of the defendant can be implied from the contract set out and the attending circumstances, which would obligate the defendant not to take the action described in the declaration.

4. It does not appear by the declaration that the plaintiff was damaged in his rights under the contract.

5. The declaration states no legal cause of action.

In the Superior Court the case was heard by *Schofield*, J., who sustained the demurrer on each of the grounds alleged by the defendant, and ordered that, unless the plaintiff should amend his declaration further before a certain day, judgment should be entered for the defendant. Judgment was so entered, and the plaintiff appealed.

The case was submitted on briefs.

W. E. Clapp, for the plaintiff.

A. Boyden, J. G. Palfrey & E. C. Bradlee, for the defendant.

HAMMOND, J. The demurrer was rightly sustained. The plaintiff had simply the option to purchase or not, as he saw fit, the real estate, upon the payment by him of $10,000. It is nowhere alleged in the declaration, either expressly or by fair implication, that at the time of the committal of the acts of which the plaintiff complains he had given notice that he elected to purchase. His contention that his acts with reference to the auction show such election, is untenable. To one reading between the lines such an attempt to sell indicates an intention to postpone a decision until after the auction rather than an election to purchase whatever may be the result.

We do not mean to indicate that, even if before the auction he

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had given notice of his election to purchase, the defendant's acts would not have been strictly within her legal rights. Certainly before such notice the duty owed by the defendant to the plaintiff was simply to hold herself ready to convey the property to the plaintiff when he paid the purchase price. The contract gave him no interest in the property. She remained the owner as before, and the only thing he had was the contract for an option. The principle upon which the plaintiff relies that a prospective vendor holds the estate for the vendee is not applicable, in such a state of things, to the extent claimed by the plaintiff.

The defendant agreed to sell to the plaintiff, upon the payment by him of a certain sum, at his option to be exercised within a certain time. Within the time the plaintiff elected to purchase, paid the money, and the defendant conveyed the property as she agreed. The defendant failed in no duty which she owed to the plaintiff. Among the authorities bearing upon the principles involved, see *Bostwick* v. *Hess*, 80 Ill. 138; *Chappell* v. *McKnight*, 108 Ill. 570; *Provident Life & Trust Co.* v. *Mills*, 91 Fed. Rep. 435; *Frick's appeal*, 101 Penn. St. 485; *Edwards* v. *West*, 7 Ch. D. 858; and also the cases cited in 21 Am. & Eng. Encyc. of Law, (2d ed.) 934.

Judgment for the defendant.

FREDERICK M. BRODIE *vs.* ROCKPORT GRANITE COMPANY.

Essex. November 7, 1907. — January 2, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability.

In an action by a workman in a granite quarry against his employer for injuries from a fall into a deep pit of the quarry, near the brink of which it was the duty of the plaintiff to stand for the purpose of transmitting signals given by the foreman in charge of the work, who worked in the bottom of the pit, to an engineer in charge of a stationary engine, in an engine house on the bank of the pit, by means of which a large derrick was operated for hoisting the stones from the pit, there was no direct evidence as to what caused the plaintiff to fall into the pit and it was purely a matter of conjecture whether he was knocked into the pit by the "big pieces of bent steel" called "dogs," which hung from

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the end of the boom of the derrick to hold the stones when hoisted, as they swung back on their way to the pit after depositing a stone that had been hoisted, or whether he fell into the pit without coming in contact with the dogs, and, even if the plaintiff was struck owing to the swing of the dogs, there was nothing on which the jury could find that the swing was due to any negligent act of the engineer or of any one for whom the defendant was responsible. *Held*, that it was right to order a verdict for the defendant.

TORT for personal injuries incurred by the plaintiff while working in the quarry of the defendant as described in the opinion. Writ dated September 16, 1904.

In the Superior Court *Fox*, J., ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. A. Pew, Jr., for the plaintiff.

W. H. Niles, (*H. R. Mayo* with him,) for the defendant.

HAMMOND, J. The plaintiff was injured by a fall into a granite quarry pit. He testified that the pit was one hundred feet long and wide, and from forty to fifty feet deep; and that there was a derrick stationed on the bank within ten or fifteen feet from the edge of the pit. It appeared that to this derrick was attached a movable boom worked by a stationary engine located upon the bank a short distance from the derrick. The derrick was used for hoisting stones from the pit, and the boom would swing over the pit and over the bank. From the end of the boom hung "big pieces of bent steel" called "dogs," weighing, as the plaintiff testified, from fifty to sixty pounds. They were about two and one half inches in diameter, "shaped like a hook," and their office was to clasp the stones while in the pit and hold them until deposited on the bank. On the westerly side of a track upon the bank leading to the derrick was a pile of large "Deer Island" stones, varying from six to eight feet in length, and on the easterly side of the track was a "pile of grout and paving stones." These piles were so situated that when the boom swung from the pit over the track it went over the centre of each pile.

As to the manner of working the boom the plaintiff testified as follows: "When a stone was picked up in the pit and was raised, there was a time when the derrick began to swing itself; when the stone got high enough to clear the bank, the strain on the steam tag would be released, and the derrick would swing around. The steam tag was used to hold the boom over the pit

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until the stone was raised clear of the pit, then the engineer slacked up on the tag, and the boom swung whatever it was carrying over the pile of Deer Island stone, over the track, and over on the other pile, then when it got on the other pile it was lowered by the engineer. I had to go to that pile and take the dogs off. After I had taken the dogs off, if they wanted the block in the hole, I would give the signal to the engineer. I was supposed, when a stone came up to take off the dogs, and send the purchase fall down into the pit, so it could be used again."

As to the plaintiff's duties he testified as follows: "It was my business to transmit signals from Lawton to the engineer. Lawton [who had charge of the work] worked down in the bottom of the pit, and his work usually kept him there. . . . Prue [the engineer] was in the engine house. Lawton could not see the engine house from the pit. It was my business to stand where I could see both Lawton and the engineer. I usually stood about ten feet from where the dogs swung over, south of the pile of Deer Island stone on the western side of the track. The dogs swung over this pile of stone about the centre. When I went to work there, Lawton told me where to stand. I always stood there ten feet south of the pile of cut stone. I had to stand within a foot or two of the edge of the quarry. I stood there all the time when the dogs passed me; that was my custom. The dogs did n't come anywhere near me as I stood there usually. That is all the instruction I ever had as to where I should stand. I received no other information, instruction or advice from any official of the defendant. I gave signals both by hand and mouth. I repeated the signals of Lawton to the engineer. The engineer never signalled to Lawton. I had other duties to perform. I had to unhitch the dogs which were on the end of the purchase falls, and which held the stone when the stone was landed."

As to the accident the plaintiff testified as follows: "I was hurt between four and five o'clock in the afternoon. Mr. Lawton was in the pit, and the four Finns were with him. They had just sent a pretty rough looking stone out of the pit, a stone which was no good, and which they were going to throw away, or use for paving stock. I was standing south of the pile of cut stone. I got a signal from Lawton and repeated the signal

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to Prue to start up, then the stone came up. After the stone was raised, I let the steam tag off, and the stone came over and landed on the pile of grout on the eastern side of the track. The pile of grout was about thirty or thirty-five feet from the derrick. The stone was lowered onto the pile. The highest part of this pile was fifteen or twenty feet high. This stone was put on the top and slid down a bit, so it was only about four feet up as I remember. It slid down the pile in a south-easterly direction. I waited until the stone stopped, then I went up and unhooked the dogs. Then I came down and hollered 'all right' to Frank Prue, the engineer. By that I meant the dogs were ready to go in the hole. When I hollered to Frank Prue I was on the track. I started towards the edge of the quarry where I generally stood. I was south of the pile of Deer Island stone. The last I remember was going towards the edge of the pit; I was then west of the track. I was ten or twelve feet to the south of where the dogs would ordinarily swing. If the dogs swung in the ordinary manner they would not have struck me. Lawton was down in the pit. If nothing had happened I would have walked to the edge of the pit and watched him until he signalled for me to stop where he wanted the block landed."

There was also evidence from which the jury might have found that the dogs were swinging considerably at the time the boom went over the pit. There was also evidence tending to show that Prue was eccentric and nervous, and that complaints had been made that he was incompetent. The injuries received by the plaintiff were such as might have been received either by being knocked into the pit by the dogs as they passed on their way to the pit, or by a fall into the pit without contact with them.

The case is close, but without further reciting the testimony we are of opinion that the plaintiff has failed to make out a case for the jury. The cause of the accident is purely a matter of conjecture. Moreover, even if there was a considerable swing of the dogs and the plaintiff was thereby struck, there is nothing upon which the jury can find that the swing was due to any negligent act of the engineer, or of any one for whom the defendant is responsible.

Exceptions overruled.

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PHILIP ROSENBERG & another *vs.* MARY A. HEFFERNAN & others.

Suffolk. December 2, 1907. — January 2, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Performance and breach. *Equity Pleading and Practice*, Master's report, Appeal.

The owner of real estate agreed in writing to convey it to one who paid to him $100 at the time of the making of the agreement. One clause of the agreement was as follows: "$350 is to be held by the purchaser to secure right of way . . . from H. . . . If said right cannot be secured for said sum the . . . [owner] . . . shall return said $100." The owner conveyed the real estate to another person, who purchased it *bona fide*, and the person to whom he had agreed to convey brought a bill in equity for specific performance of the agreement. After a hearing thereon before a judge of the Superior Court, a decree was made by him, finding that the defendant had refused to perform his agreement and that the plaintiff had been damaged thereby, but refusing specific performance and referring the case to a master to assess damages. From this decree the defendant appealed. There was no report of the evidence. The master in his report, which was filed after a hearing before him on the question of damages only and contained no report of evidence, found among other facts that the plaintiff ascertained that the right of way could not be purchased from H. for $350 but could be purchased for $500, "Whereupon," the parties "agreed that whatever the plaintiff should be called upon to pay for the right of way should not be charged against the defendant at more than the $350 reserved by the terms of the agreement"; and he therefore deducted $150 from the gross damage suffered by the plaintiff. The defendant filed exceptions to the master's report. A final decree was entered overruling the exceptions, confirming the report, and awarding the plaintiff damages, and the defendant appealed, and contended that the finding of the master that the right of way could not be purchased for $350 excused him, under the clause quoted above, from performance of his agreement to convey the real estate to the plaintiff. *Held*, that the other finding of the master as to the later agreement rendered it unnecessary to consider the defendant's contention, even if the question properly was raised upon the record.

From the record before this court on an appeal from a decree for the plaintiff in a suit for specific performance of an agreement in writing for the conveyance of real estate, it appeared that a clause in the agreement was, "If the . . . [defendant] . . . shall be unable to give title as above stipulated, any payments made under this agreement shall be refunded, and all obligations by either party hereto shall cease." The judge presiding at the hearing of the suit made a decree which denied specific performance on the ground that the defendant had conveyed to a *bona fide* purchaser, but found that the defendant had refused to perform the agreement and referred the case to a master for assessment of damages. He also found that, at the time when conveyance to the plaintiff was called for, there were incumbrances of record upon the property. No evidence was reported.

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The defendant contended that, under the clause quoted, he was excused from conveyance. *Held*, that, the evidence not being reported and it not appearing that the incumbrances were valid, the finding for the plaintiff would not be revised.

Where a suit for specific performance of an agreement in writing for the conveyance of real estate is referred to a master for an assessment of damages after a hearing by a trial judge who found that the defendant had broken the agreement, the master is not authorized to report any finding of fact or ruling of law as to whether there was a breach of the agreement.

BILL IN EQUITY for specific performance of an agreement in writing to convey real estate, filed in the Superior Court for the county of Suffolk, August 12, 1903.

The history of the case is stated in the opinion. *Fessenden*, J., who presided at the various hearings, stated, as the ground for refusing specific performance of the agreement, that the defendants had conveyed to a *bona fide* purchaser. The finding of the master, referred to in the third paragraph of the opinion, was made under the following circumstances: He had found that the difference between the market value of the property at the time when the defendants should have conveyed and the sum which the plaintiffs had agreed to pay for it was $1,000, "so that there is an apparent damage to the plaintiffs . . . of $1,000; but," he added, "from this there is to be deducted $150," and, continuing with an explanation of why such sum should be deducted, he stated that, "under the terms of the agreement" sued on, "the plaintiffs were to hold $350 of the purchase money 'to secure a right of way and certain other privileges from Michael Heffernan.' The plaintiffs ascertained that this 'right of way and certain other privileges' referred to could not be purchased for $350, whereupon they agreed and it was understood between the plaintiffs and the defendants Heffernan that whatever the plaintiffs should be called upon to pay for this right of way and other privileges should not be charged against the Heffernans at more than the $350 reserved by the terms of the agreement, and I find that they could not purchase the said 'right of way and certain other privileges' for $350 but could purchase the same for $500, an increased expense of $150, and it is conceded by the plaintiffs, and I find, that there should be deducted from the $1,000 above found as damages, this sum of $150, leaving the actual damage to the complainants $850; and I find that the plaintiffs are entitled to recover of the defendants the sum of

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$850 as damages, and the further sum of $100, the amount deposited by them with the defendants at the time of the signing of said agreement."

E. J. Doherty, for the defendants.

M. Fischacher, for the plaintiffs.

MORTON, J. This is a bill in equity to enforce the specific performance of a written agreement entered into between the plaintiffs and the defendants, Mary A., and her husband William G. Heffernan, for the sale and purchase of certain real estate belonging to the said Mary situated in Cambridge. The premises were subject to a mortgage in favor of one Celia Green and, subsequent to the written agreement aforesaid, were conveyed by said William and Mary to one Louis Levy. The said Green and Levy were made parties to this suit, and the bill contained allegations of fraud and conspiracy against all of the defendants. There was a hearing, and a decree was entered dismissing the bill as to said Green and Levy and denying specific performance, but finding that the Heffernans had refused to perform their agreement and that the plaintiffs had been damaged thereby, and retaining the bill for the assessment of damages. The Heffernans appealed. There is no report of the evidence on which this decree was based. The case was sent to a master to assess the damages. He made a report assessing damages in favor of the plaintiffs in the sum of $950. Exceptions to the report were filed by the said William and Mary, which were overruled, and the master's report was confirmed and a final decree was entered in favor of the plaintiffs against the defendants, William and Mary, for the sum of $950 damages, with interest. The defendants Heffernan appealed from this decree and from the order confirming the master's report. There is no report of the evidence on this branch of the case. The presiding justice at the request of the defendants, Heffernan, whom we shall speak of hereafter as the defendants, made certain findings of fact in addition to those recited in the first decree. The findings thus made, and the master's report in regard to the assessment of damages and the exceptions thereto, and the pleadings are all that is before us.

The defendants do not contend that the bill was not properly retained for the assessment of damages if it appeared that they

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had committed a breach of the agreement and were unable to specifically perform it.

The agreement contained amongst other provisions the following: "Three hundred and fifty dollars is to be held by the purchasers to secure right of way and other privileges from Michael Heffernan of said Cambridge but if said rights are secured for less than said sum, the balance is to be paid to said Mary A. Heffernan, if said rights cannot be secured for said sum the party of the first part shall return said $100," meaning the $100 which the agreement recites was paid by the plaintiffs as a part of the purchase price on the day on which the agreement was entered into. The master found that "the right of way and other privileges" referred to could not be purchased for $350 but could be purchased for $500. And one contention of the defendants is that, according to the true construction of the provision quoted above, the effect of the master's finding was to relieve them from any further obligation to convey, their contention being that, according to the true construction of the written agreement, if the right of way and other privileges could not be secured for the sum named, then the $100 was to be returned and the agreement was to be at an end and there was no liability for damages on their part. But the master also found that the parties "agreed and it was understood between the plaintiffs and the defendants Heffernan that whatever plaintiffs should be called upon to pay for this right of way and other privileges should not be charged against the Heffernans at more than the three hundred and fifty dollars ($350) reserved by the terms of the agreement." That is, as we construe the master's finding, he found, not as a matter relating to the construction of the written agreement, but independently of the written agreement, that, after the written agreement was entered into, it was agreed and understood between the plaintiffs and the defendants, in substance, that the defendants would pay $350 to secure the right of way and other privileges, but that, if more had to be paid, it was to be and would be paid by the plaintiffs. The reference to "the three hundred and fifty dollars reserved by the terms of the agreement" shows, we think, that the understanding and agreement found by the master was a later one. In view of the finding thus made by the master, it is enough, we think, to

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say of the defendants' contention that the question as to the true construction of the written agreement, if open to the defendants, as it may be on appeal, is immaterial; — the written agreement being superseded in this particular by the later agreement. In addition to this, the question is not raised by the exceptions to the master's report as is later more particularly pointed out.

The agreement also provided that, "If the party of the first part (the defendants) shall be unable to give title or to make conveyance as above stipulated, any payments made under this agreement shall be refunded, and all other obligations of either party hereto shall cease, but the acceptance of a deed and possession by the party of the second part shall be deemed a full performance and discharge hereof." The defendants contend in substance that there were incumbrances upon the property at the time when the bill was brought, consisting of certain attachments placed upon it and a bill in equity brought by one Michael J. Heffernan which rendered them unable to give a title such as was contemplated by the agreement, and that therefore, by the very terms of the agreement, they had committed no breach of it and were not liable in damages.

There are several difficulties with this contention. In the first place, assuming that the defendant's construction of the agreement is right, and that they were not bound to convey unless they could give a clear title subject to the mortgage, the evidence is not before us, and we cannot say, therefore, whether the title was or was not clear, or whether, for instance, the attachments and the bill in equity may not have been fraudulent and collusive. In the next place, it is apparent from his findings of fact and the decree which he entered that the presiding justice did not regard the attachments and the bill in equity as constituting incumbrances on the property, and, as already observed, we have not the evidence before us so that we can review his conclusions. Lastly, none of the exceptions raise the questions which the defendants now seek to raise as to the construction of the agreement and the effect of the incumbrances, if any there were, although, as already observed, they may be open to them on their appeal. The first exception is "to the master's finding that it was not within his province to report any finding of fact or ruling of law as to whether or not there was any breach of the

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agreement." The master's finding was clearly right, as the case was sent to him only for the assessment of damages, the court having previously found that there was a breach of the agreement by the defendants. The second exception is to the amount of damages found, the third to his finding as to the market value of the property and the fourth to his finding that the right of way could be purchased for $500. None of these raise in an intelligible form any question as to the construction of the written agreement, and they were all rightly overruled.

The result is that the decree must be affirmed.

Decree affirmed.

MINERVA B. HERRICK *vs.* BENJAMIN GLIDDEN.

Essex. November 6, 1907. — January 8, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Partition.

At the trial of a petition for partition of real estate alleged to be held in common by the petitioner and the respondent, it appeared that, after the death of a former owner of the property, an assignment of dower was made to his widow of the lower part of a dwelling house upon the property, and that subsequently, under proper license, the administrator of the estate of the former owner sold and conveyed the property to the respondent's predecessor in title, "saving and reserving that part . . . set off to" the widow. Later the widow died and the heirs of the former owner conveyed to the petitioner's predecessor in title all the "right, title, interest and estate . . . which was set off to" the widow. Before this petition was filed, the house had been removed. The petitioner contended that the land was assigned to the widow as dower, and that, not having been conveyed by the deed of the administrator, it had come to him by deed of the heirs on the termination of the dower estate, while the respondent contended that only an easement in the land had been assigned, and that the land had come to him by the administrator's deed. *Held*, that the petition must be dismissed since, upon either contention, the estate was owned in severalty and not in common.

PETITION for partition of land in Beverly, alleged by the petitioner to be held in common by her and the respondent, filed in the Superior Court for the county of Essex July 28, 1903.

There was a trial before *Schofield*, J., on an agreed statement of facts, the material portions of which are as follows:

Both the petitioner and the respondent derived their titles

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from one John Pickett, who died in 1821, seised of real estate which included a lot of land with a dwelling house upon it. An assignment of dower was made in 1822 to his widow, which, besides an interest in other real estate, included, as to the dwelling house and lot referred to, the whole of the lower part of the house, a small portion of the cellar and easements in other parts of the house and surrounding yard. Thereafter in the same year the administrator of the estate sold to Thomas L. Pickett, the respondent's predecessor in title, the dwelling house and lot, "saving and reserving that part of said house and land that hath been set off to said deceased's widow as her dower in his real estate." The respondent claimed exactly what was conveyed by the administrator's deed.

The widow died in 1847, and then the heirs of John Pickett joined in a deed to the petitioner's predecessor in title, conveying the "right, title, interest and estate in and to all that portion of the real estate of the late John Pickett aforesaid which was set off to his widow, . . . together with all the privileges thereto belonging." The petitioner claimed exactly what was conveyed by this deed of the heirs.

The petitioner and the respondent joined in selling the house, which was moved off from the premises, the proceeds of the sale being divided "proportionately." This petition is only with regard to the land upon which the house had stood.

The presiding judge ruled that the assignment of dower gave to the widow an estate in severalty for life in the land under the house, leaving the reversion in the heirs; that the deed of the administrator conveyed the residue of the property which had not been set off; that the deed of the heirs, after the widow's life estate fell in, conveyed the fee simple in the portion of the property described in the assignment of dower to the petitioner's predecessor in title; that "the petitioner is not a tenant in common, but in severalty. She is entitled to the land on which the house stood. The court rules that she is not entitled to partition as prayed for, but may be entitled to a writ of entry or other remedy for possession." He therefore dismissed the petition and the petitioner appealed.

S. Perley, for the petitioner.

R. M. Mahoney, for the respondent.

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HAMMOND, J. If, as contended by the petitioner, the land, and not merely an easement therein, was included in the dower set off to the widow, then it passed to Batchelder by the deed given by the heirs to him after her death, and afterward by mesne conveyances to the petitioner, and now is owned by him in severalty. *Symmes* v. *Drew*, 21 Pick. 278. If, as contended by the respondent, not the land, but only an easement therein, was included in the set-off, then the land passed to Thomas L. Pickett by the deed of the administrator of the estate given to him before the death of the widow, and by mesne conveyances has passed to the respondent who holds the same in severalty. Either way there is no land owned by the petitioner and respondent in common, and for that reason the petition must be dismissed. The rights of the petitioner, if any she has, must be settled in some other proceeding.

Petition dismissed.

ELIZABETH M. LOW, executrix, *vs.* JULIA A. LOW.

Norfolk. November 11, 1907. — January 11, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pleading, Civil, Answer, Waiver of defect in pleadings. *Waiver.*

An amended answer of the defendant in an action of contract upon a promissory note, which alleged that the plaintiff "obtained the defendant's signature to the note by deception and fraud, to wit: — by the false and fraudulent representations" of the plaintiff, was filed by consent of the plaintiff on the same day on which the case was tried, and, at the trial, the presiding judge excluded evidence tending to show the truth of its allegations. *Held*, that, there having been no objection to the amended answer until the evidence in support of its allegations was offered, the insufficiency as a matter of pleading of the statement of the defence did not warrant the excluding of competent evidence of its truth.

CONTRACT upon two promissory notes. Writ in the Superior Court for the county of Norfolk dated March 3, 1906.

An answer was filed containing a general denial, a denial of the genuineness of the signatures on the notes, and an allegation of payment. On the day of the trial the defendant, with the con-

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sent of the plaintiff, was allowed to file the following amendment to her answer: "The defendant further answering says that the plaintiff's intestate obtained the defendant's signature to the notes declared upon in this action by deception and fraud, to wit: — by the false and fraudulent representations of the plaintiff's intestate."

At the trial, which was before *Hardy*, J., it appeared that one of the notes was given in part settlement of the accounts between the plaintiff's testator and the estate of Samuel G. Low, his father, and the defendant asked a witness for the plaintiff, "Is n't it true that Mr. Low represented and stated to Julia Low that the accounts as stated there were true, and were all the accounts and all the funds of the estates in order to induce her to sign this note." The question was excluded by the presiding judge "under the form of pleadings," and the defendant excepted. No further contention being made by the defendant, a verdict was directed for the plaintiff.

W. C. Adams, for the defendant.

G. A. A. Pevey, for the plaintiff.

LORING, J. The statement of the defence set up in the amendment to the answer was insufficient as matter of pleading. But that is not a reason for excluding competent evidence of its truth. *Goodsell* v. *Trumbull*, 135 Mass. 99. *Tapley* v. *Goodsell*, 122 Mass. 176. See in this connection *Ward* v. *Merriam*, 193 Mass. 185. See also *Chace* v. *Sherman*, 119 Mass. 387, where it was held that the insufficiency of a declaration as matter of pleading cannot be raised by a request for instructions to the jury; and *Huntress* v. *Burbank*, 111 Mass. 213, where an unsuccessful attempt was made to raise that question by a request for a ruling at the beginning of the trial. The evidence before the court in *Robinson* v. *Trofitter*, 106 Mass. 51 (relied on by the plaintiff), was excluded because the affirmative defence in proof of which it was offered was not set up in the answer at all.

Exceptions sustained.

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FRANK K. CLARK *vs.* AMERICAN EXPRESS COMPANY.

Middlesex. November 13, 1907. — January 11, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, In use of platform of railroad station. *Carrier*, Of passengers.

At the trial of an action of tort against an express company to recover for personal injuries which the plaintiff received by being run into by a hand truck of the defendant as he was about to take a train in a railroad station, there was evidence warranting the jury in finding that the plaintiff intended to get upon the smoking car which he expected to find at the front of the train. There were thirteen cars on the train, and the smoking car was the fifth car from the rear and the eighth from the front of the train, but he passed it by without seeing it and went forward on the station platform, also passing some day coaches and Pullman and private cars, until he came to a series of baggage and express cars, when, without looking behind and without stepping out of his direct course, he leaned to the right to see where the smoking car was, and was run into from behind by the truck. The plaintiff testified that he knew "that the smoking car is never ahead of the baggage cars," that he knew that some of the cars had signs hung on them, and that he saw a number of trucks about which were being unloaded on to the train. *Held*, that there was evidence warranting the jury in finding that the plaintiff was where he had a right to be, that he was in the exercise of due care, and that he was injured by negligence of the defendant's employees; *also* that he was not as matter of law guilty of contributory negligence in not looking behind before he leaned over to look forward.

Whether or not one, who is intending to take a train in a railroad station, is in the exercise of due care in the use of the platform between the trains, and is, in his relation to an express company using hand trucks on the same platform, within his rights as an invited person, or is a trespasser or a mere licensee, depends upon what use of the premises is reasonably necessary under the circumstances as they appear to him at the time, not under the circumstances as they are in fact.

No exception lies to the refusal of the judge presiding at the trial of an action of tort against an express company for personal injuries received by the plaintiff by reason of his being run into by a hand truck of the defendant on the platform of a railroad station as he was about to take a train, to rule that "there was obvious danger in the vicinity of the express and baggage cars by reason of the number of employees and trucks moving in both directions and handling baggage at a time shortly before the train was scheduled to start," that being one of the matters for the jury to consider in passing upon the question whether the plaintiff was negligent.

TORT for personal injuries received by the plaintiff, as he was about to take a train at the North Station in Boston, from being run into by a heavily loaded hand truck of the defendant. Writ

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in the Superior Court for the county of Middlesex dated February 16, 1906.

There was a trial before *Sherman*, J. Besides the facts stated in the opinion, the defendant introduced evidence tending to show that the plaintiff frequently took the train that went at the same time and from the same track as the train that he was about to take when injured, and was familiar with the surroundings; that between tracks 12 and 13, extending out to the end of the train shed, was a concrete platform and that a line of posts supporting the roof of the shed ran along the middle of the platform; that, beyond the end of the train shed, there was wooden planking instead of concrete; that passengers about to take trains on track 13 generally, but not always, walked on the side of the platform nearest that track, and trucks generally used the other side; that the platform beyond the train shed seldom was used by passengers, and that, when injured, the plaintiff was on the platform beyond the train shed.

At the close of the evidence, the defendant requested the following rulings:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. If the plaintiff was going to become a passenger upon the train, he was entitled to use only such approaches to the train as were reasonably necessary in order that he might reach the passenger cars.

3. The plaintiff had no right to go outside of the train shed on that part of the platform between the two tracks beyond the passenger cars. In going to such a place, he was at best a mere licensee, towards whom the defendant owed only the duty of refraining from wantonly and recklessly injuring him.

4. The invitation implied from the situation and appearance of the premises for the plaintiff to go upon the property of the Boston and Maine Railroad is confined within such limits as were reasonably necessary for him in going to take the train as he intended. The invitation implied did not extend to the whole premises.

6. There was obvious danger in the vicinity of the express and baggage cars by reason of the number of employees and trucks moving in both directions and handling baggage at a time shortly before the train was scheduled to start.

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9. The act of the plaintiff in stepping to the right for the purpose of looking ahead without first looking to see whether he was stepping into the path of an approaching truck was a failure upon his part to exercise due care and he cannot recover.

The requests were refused, and the defendant excepted. The jury returned a verdict for the plaintiff.

A. M. Pinkham, for the defendant.

G. F. Ordway, for the plaintiff, was not called upon.

LORING, J. The underlying trouble with the argument of the defendant's counsel is twofold. In the first place he assumes that the rights of the plaintiff depend upon the actual situation and not on what appeared to the plaintiff to be the actual situation; and in the second place he assumes that what his evidence showed to have been the fact must be assumed to have been the fact unless directly contradicted by evidence introduced by the plaintiff.

The evidence warranted the jury in finding the following facts: The plaintiff went to the North Union Station in Boston, on the morning of the accident here in question, to go to Newburyport by the nine o'clock train, intending to take his seat in the smoking car. He expected to find the smoking car at the head of the train and for that reason did not look for it until he had reached the head end of the forward private car and the rear end of the baggage car. The smoking car was in fact the fifth car from the rear and the eighth car from the head of the train. Behind the smoking car were four ordinary passenger cars; ahead of it were three Pullman cars, one private car for the officials of the Boston and Maine Railroad, the baggage car opposite to which the accident here complained of happened, and in front of that two express cars and a mail car. When the plaintiff arrived at the head end of the private car and at the rear end of the baggage car, he "advanced a little further" in search of the smoking car, leaned a little to the right to get a better view of the cars ahead of him, and was run into from behind by a truck of the defendant, heavily loaded with express matter, and was knocked down. The nine o'clock train which the plaintiff was intending to take was on track 13, on the left of the platform as the plaintiff was walking. The plaintiff was walking on the right side of that platform, that is to

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say, nearer track 12 which was on the right side of it. The plaintiff did not step out of his direct course when he leaned over, and received no warning from the defendant's servants who were pushing and pulling the truck.

This made out that the plaintiff was where he had a right to be, that he was in the exercise of due care, and was injured by the negligence of the defendant's employees.

It is true that the plaintiff testified "that he knew that the smoking car is never ahead of the baggage cars." But it is also true that he had no reason to suppose that it would be behind the three Pullman cars and the private car, and for that reason he was going where he reasonably thought he ought to go to find it. It is also true that he testified that he knew that some of the cars are marked by little signs hung out on them. But a passenger cannot be charged with negligence because he passes by four cars without examining the signs hung out on them, when he is in search of the smoking car and he sees that the train is a long one and the train in fact consists of thirteen cars. When such a passenger finds himself at the head end of the forward passenger car (in this case a private car) and at the rear end of the baggage car, he cannot be said to be going beyond the invitation apparently held out if he advances a little further in search of the smoking car and leans over and out to get a better view of the cars ahead of him, even if he sees that there are a number of trucks about and the contents of them or some of them are being unloaded on to the train. We are also of opinion that he was not guilty of contributory negligence as matter of law because he did not look behind him before he leaned over.

For these reasons we are of opinion that the judge was right in not directing a verdict for the defendant, and the exception to the first ruling asked for is not well taken.

The second, third and fourth rulings asked for were rightly refused. As we have already said, the plaintiff's rights depend upon what was reasonably necessary as the situation appeared to the plaintiff, not as the situation was in fact.

The presiding judge was right in refusing to charge on the particular facts stated in the sixth ruling asked for. That was a matter to be considered by the jury in passing on the question whether the plaintiff was negligent.

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The difficulty with the ninth request is that it assumes that to be a fact which the jury may have found not to be a fact.

We have examined *Cowen* v. *Kirby*, 180 Mass. 504, and the other cases cited by the defendant, and find nothing in them which supports its contentions.

Exceptions overruled.

DANIEL J. McGIVERN *vs.* JOHN W. STEELE.

Suffolk. November 14, 1907. — January 11, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Evidence, Of testimony of witness at former trial, since deceased. *Witness*. *Practice, Civil*, Conduct of trial, Offer of proof.

Evidence of what a witness, since deceased, testified at a former trial is competent in any subsequent trial of the same issues between the same parties.

At the trial of an action of contract, a material fact for the plaintiff to prove was that a demand had been made on the defendant, to prove which the plaintiff, having shown that there had been a former trial of the case at which a witness, W., had testified, and that W. had died, desired to ask the defendant in cross-examination whether W. had not testified that such a demand had been made. The presiding judge ruled, "What statements W. made, I shall exclude." *Held*, that the ruling was wrong, the evidence being competent, and that, in view of the terms of the ruling of the presiding judge, the plaintiff, in order to have this exception sustained, was not required to show that the witness could give W.'s testimony with the necessary accuracy.

CONTRACT upon an account annexed. Writ in the Municipal Court for the City of Boston dated April 12, 1906.

There was a declaration in set-off, also upon an account annexed.

On appeal to the Superior Court, there was a trial before *Hardy*, J., whose ruling with regard to the question asked in cross-examination of the plaintiff by the defendant was as follows: "Statements made by a witness subsequent to a bringing of a suit are not competent, are they? . . . If you can find out from this witness that he has made any statements even to a man now dead, it is competent. What statements Wilkins made, I shall exclude." There was a verdict for the plaintiff, and the defendant alleged exceptions.

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The case was submitted on briefs.

P. B. Kiernan, for the defendant.

D. J. Maloney, for the plaintiff.

LORING, J. In support of his declaration in set-off, the defendant offered to show that a demand upon the plaintiff was made by one Wilkins in his (the defendant's) behalf. And on this bill of exceptions (which is very meagre) we must assume that this was a material fact in support of the defendant's case. The defendant offered to prove this fact by asking the plaintiff on cross-examination, whether Wilkins had not so testified at the trial in the Municipal Court of the case then being tried. The defendant had previously proved by the plaintiff that Wilkins testified at the trial in the court below, and since then had died. This was excluded by the presiding judge on the ground that "statements made by a witness subsequent to a bringing of a suit are not competent."

Had the competency of the testimony offered depended upon R. L. c. 175, § 66, the ruling would have been right. But the ground on which the evidence was competent was that it was the testimony of a witness who had testified in court on the same subject matter and had since died; as to which, see *Commonwealth* v. *Richards*, 18 Pick. 434; *Warren* v. *Nichols*, 6 Met. 261; *Yale* v. *Comstock*, 112 Mass. 267; *Costigan* v. *Lunt*, 127 Mass. 354.

The exclusion of this testimony in the case at bar cannot be supported now on the ground that no offer was made to show that the plaintiff could repeat Wilkins's testimony with the necessary accuracy, as to which see *Yale* v. *Comstock*, 112 Mass. 267; *Warren* v. *Nichols*, 6 Met. 261; *Commonwealth* v. *Richards*, 18 Pick. 434. There was no occasion for the defendant to go into that detail when the presiding judge had ruled that no testimony given by Wilkins after the commencement of the action then on trial would be admitted.

Exceptions sustained.

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COMMONWEALTH *vs.* HENRY DELANO.

Suffolk. November 18, 1907. — January 11, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Unnatural and Lascivious Act. Words, "Copulation."

A person who commits any unnatural and lascivious act with another person can be convicted under R. L. c. 212, § 27. Copulation is the natural act of coition and is not within the statute, the word being used inaccurately in the opinion in *Commonwealth* v. *Dill*, 160 Mass. 536, 537.

INDICTMENT found and returned in the county of Suffolk in August, 1907, with six counts under R. L. c. 212, § 27, each count charging the defendant with committing an unnatural and lascivious act with a person named, the persons named in the several counts being girls from fourteen to about eleven years of age.

In the Superior Court the defendant was tried before *Schofield*, J. The jury returned a verdict of guilty; and the judge, being in doubt whether the acts described in the evidence constituted an offence under the statute or whether they should be dealt with at common law, reported the case for determination by this court. If the conviction could be sustained upon the evidence, the verdict was to stand; otherwise, the verdict was to be set aside and such further proceedings were to be had against the defendant as might be authorized by law.

The case was submitted on briefs.

W. R. Scharton, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

LORING, J. The only argument put forward by the defendant is that although the act here complained of was an "unnatural and lascivious act with another person" it was not an act of copulation and that for that reason on the authority of what was stated *obiter* in *Commonwealth* v. *Dill*, 160 Mass. 536, 537, it is an act not within R. L. c. 212, § 27.

It is plain that St. 1887, c. 436, now R. L. c. 212, § 27, was intended to make criminal any and all unnatural and lascivious

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acts with another person. Copulation is the natural act of coition and is not within the statute. It is evident that the word "copulation" was not used accurately in the opinion in *Commonwealth* v. *Dill*, 160 Mass. 536, 537.

Verdict to stand.

ARCHIBALD T. DAVISON *vs.* MARYLAND CASUALTY COMPANY.

Suffolk. November 19, 1907. — January 11, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Insurance, Against liability.

By a policy of insurance against liability for accidents, the insurer agreed that the insured was to be reimbursed for sums paid by him not exceeding $5,000 on judgments recovered after a trial founded on an accident described in the policy. An action was brought against the insured for injuries from an accident covered by the policy. The insurer defended the action under a provision in the policy that it should do so "at its own cost" and "in the name and on behalf of the insured." The plaintiff in the action obtained a judgment for $5,000, and, against the remonstance of the insured, the insurer alleged exceptions which were overruled by this court, the necessary delay causing an increase in the interest on the amount of the verdict. Final judgment was entered for $5,420, made up of $5,000 for the amount of the verdict, $90 for taxable costs and $330 for interest on the amount of the verdict. The insurer paid $5,090, including the amount of the verdict and the taxable costs, but refused to pay the $330 for interest included in the judgment. Execution for this last named amount issued against the insured, who paid it, and sued the insurer for reimbursement under his policy. *Held*, that the plaintiff could not recover, the defendant having discharged fully its obligations under the policy; that the provision in the policy that the insurer should defend such an action against the insured "at its own cost" was not intended to extend the limit of its liability, and that the provision that the defence should be "in the name and behalf of the insured" did not mean that the insurer should regard the interest of the insured to the prejudice of its own interest if there was a conflict between them, such as occurred on the question of carrying the case to this court on exceptions; that the fact that the defendant had paid the amount of the taxable costs included in the judgment was immaterial and it was not necessary to consider whether the defendant was bound to pay these costs or not; that under the policy the limit of the defendant's obligation was a judgment not exceeding $5,000 and the fact that the amount of the judgment in excess of that sum was made up of interest was immaterial.

CONTRACT on a policy of insurance against liability for accidents caused through the negligence of the assured in relation

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to the horses or vehicles in his service and the use thereof, to recover the sum of $330 with interest thereon from March 29, 1905, when that sum was paid by the plaintiff as stated below. Writ dated Aug. 14, 1905.

In the Superior Court the case was submitted to *Bell*, J., upon an agreed statement of facts as follows:

On May 14, 1900, for the consideration therein stated, the defendant issued to the plaintiff a policy, insuring the plaintiff in accordance with that policy, a copy of which was annexed and made a part of the statement of facts, against loss from common law or statutory liability for damages, on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured or his agents by means of the horses or vehicles in his service.

One Dennis McCrohan claiming to have been injured on or about February 8, 1901, by one of the teams belonging to and used by the plaintiff, on or about February 18, 1901, brought an action for $15,000 damages against the plaintiff herein, returnable to the Superior Court for Suffolk County to recover for the injuries alleged to have been sustained at that time, the alleged accident being of the kind against which the defendant had undertaken to indemnify the plaintiff.

The plaintiff herein at once notified the defendant of the accident and the commencement of the action, and the defendant, by its counsel, entered an appearance for this plaintiff in that action and thereafter defended that action and conducted and controlled the litigation until its conclusion as hereinafter set forth.

The case was tried in January, 1904, resulting in a verdict for McCrohan for $5,000 against the plaintiff herein.

Although the plaintiff herein requested the defendant to pay this verdict, it refused to do so, and in spite of his remonstrances carried the case on exceptions to the Supreme Judicial Court for the Commonwealth. These exceptions were overruled on March 8, 1905, and judgment was entered and execution was taken out against the plaintiff herein for $5,420.21 made up as follows:

Amount of the verdict	$5,000.00
Taxable costs	90.21
Interest upon the verdict	330.00
	$5,420.21

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On March 29, 1905, the defendant paid to McCrohan $5,090.21 being the amount of the verdict and taxable costs and refused to pay thereon or to the plaintiff herein the $330 of interest. Thereafter the plaintiff herein upon due demand upon the execution paid the balance of $330 and satisfied it in full.

Although the plaintiff has paid the $330 interest and complied with all the terms and conditions of the policy, so as to entitle him to be paid by the defendant whatever sum he might be entitled to under the policy, the defendant, after demand upon it by the plaintiff herein, absolutely refused to pay this amount, asserting that it had already fully discharged all its obligations under the policy.

Among the "special agreements" contained in the policy was the following:

"A. The Company's liability for an accident resulting in injuries to, or in the death of one person is limited to Five thousand Dollars ($5,000), and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of any number of persons is limited to Ten thousand Dollars ($10,000)."

The following are the second, third and eighth of the "conditions precedent" printed on the back of the policy, which are referred in the opinion:

"2. If thereafter any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this Policy, immediate notice thereof shall be given to the company, and the Company will defend against such proceeding, in the name and on behalf of the Assured, or settle the same at its own cost, unless it shall elect to pay the Assured the indemnity provided for in Clause 'A' of Special Agreements as limited therein.

"3. The Assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding without the consent of the Company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The Assured when requested by the Company shall aid in securing information and evidence and in effecting settlements, and in case the Company calls for the attendance of any employee or employees as witnesses at inquests and in suits, the Assured

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will secure his or their attendance, making no charge for his or their loss of time."

"8. No action shall lie against the Company as respects any loss under this Policy unless it shall be brought by the Assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the Assured for damages unless at the expiry of such period there is such an action pending against the Assured, in which case an action may be brought against the Company by the Assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the Company, after the expiration of six years from the date of the given injuries or death. The Company does not prejudice by this clause any defences to such action which it may be entitled to make under this Policy."

The judge found for the plaintiff in the sum of $374,11, and ordered that judgment be entered for that amount. From the judgment thus entered the defendant appealed.

M. O. Garner, for the defendant.

H. M. Channing, for the plaintiff.

LORING, J. The contract here sued on is one to "indemnify" the plaintiff "against loss from common law or statutory liability for damages on account of bodily injuries . . . caused through the negligence of the assured," &c. What is meant by the words "against loss" is described in article 8 of the conditions precedent to which the insurance is stated to be subject. Article 8 provides that no action shall lie for "any loss," unless brought "to reimburse" the assured "for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." By special agreement A, "the company's liability for an accident resulting in injuries to . . . one person is limited to five thousand dollars."

The result of these provisions is that the plaintiff was to be reimbursed for sums paid by him not exceeding $5,000, on judgments recovered after a trial founded on accidents described in the policy. See *Connolly* v. *Bolster*, 187 Mass. 266, and cases there cited.

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The first argument of the plaintiff's counsel in support of the ruling made in the court below is that interest accruing on the verdict included in the judgment is a part of the expense of litigation which is to be borne by the defendant under article 2 of the conditions precedent. That article provides that the company will "defend against such proceeding in the name and on behalf of the assured, or settle the same at its own cost." Doubtless the defendant must pay all expenses of the defence of the action against the insured, whether the words "at its own cost" qualify the verb "defend" or are to be limited to the words "settle the same." But this article is not put in to add to the indemnity to which the plaintiffs are entitled. It is manifestly inserted to describe the terms on which the defence of the action which is given to the company for its own benefit by articles 2 and 3 is to be conducted. See in this connection *Connolly* v. *Bolster*, 187 Mass. 266, 270.

The next argument put forward by the plaintiff's counsel is that the effort made to upset the verdict for $5,000 was made in the interest of the defendant alone; that the plaintiff had nothing to gain from it, and as matter of fact he remonstrated against the case being carried further. Unless the words in article 2 of the conditions precedent "in the name and on behalf of the insured" are to be construed to require the defendant, in conducting the defence of the action brought against the assured, to consult the interest of the insured to the prejudice of its own interests in case of a conflict between the two, this argument cannot prevail; and we are of opinion that these words cannot be given that construction. Take for example the possibility suggested by the plaintiff's counsel in connection with the defendant's determination to carry the exceptions in the case at bar to this court. If the defendant had been successful in getting the verdict of $5,000 set aside, the jury, on the new trial, might have brought in a verdict for $10,000. We cannot believe that these words required the defendant to forbear pressing the exceptions which had been taken in the hope that a second trial would result more favorably to it, because a second trial might result to the detriment of the plaintiff, who had nothing to pay on the verdict in question if the case was not carried further.

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By articles 2 and 3 of the conditions precedent, the conduct of the defence is given to the defendant in the fullest terms, manifestly for its (the insuring company's) benefit. These words ("in the name and on behalf of the insured") were not in our opinion inserted to describe or qualify the discretion of the defendant in the conduct of that defence, but to state that although the case is against the assured the conduct of the defence shall be in the insurer alone.

Such a contingency as that which has happened in the case at bar furnishes a reason for such a contract of indemnity as that now before us in terms other than those employed in the case at bar. But the terms of the contract here in question are plain and admit of but one construction.

The last argument put forward by the plaintiff is that the interest here in question stands on the same footing as taxable costs; and since the defendant paid the taxable costs it must, if "consistent," pay this interest. For the reasons already stated we are of opinion that the defendant was not bound to pay the interest. There is no occasion for us to consider whether the defendant was bound to pay the costs which it paid.

An insured who pays $5,000 or a smaller sum on a judgment can recover the sum paid with interest. But the fact that the amount of the judgment is made up in part of interest on the verdict is immaterial. The measure of the defendant's obligation is a judgment not exceeding $5,000. With the possible exception of *Cudahy Packing Co.* v. *New Amsterdam Casualty Co.* 132 Fed. Rep. 623, this result has been reached in all the cases brought to our attention. See *National & Providence Worsted Mills* v. *Frankfort Ins. Co.* 28 R. I. 126 and cases there cited.

Judgment for the defendant.

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CATHARINE BEIRNE *vs.* LAWRENCE AND METHUEN STREET RAILWAY COMPANY.

Essex. November 8, 1907. — January 13, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence.

If a woman on a November morning before daylight is following a path, leading to the mill where she works, which passes through vacant land and then crosses a street in which there is a street car track, and if a car, which then is eight hundred and fifty feet from the point of crossing, is approaching "very fast" lighted by thirteen incandescent lights inside and one on the dashboard, and the woman has an unobstructed view of this car which continues to be unobstructed until she reaches the crossing, and she then walks in front of the car and is run over, in an action to recover for her injuries, it does not help her to testify that she looked and saw no car coming, for, unless she intended to be injured, she either did not look or else looked carelessly. Following *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242.

In an action for personal injuries from being run over by an electric car of the defendant as the plaintiff was on her way to work early on a November morning before daylight, if it appears that for about a year before the accident the cars of the defendant were equipped with search lights in front and that the car which ran over the plaintiff had no search light lighted, but had a small incandescent headlight and had thirteen incandescent lights inside, the fact of the absence of the search light is immaterial unless it also appears that the plaintiff knew of the previous use of search lights and relied on the absence of a search light, and if she testifies that when she used to see the car in the month before the accident it "had a small light on it" and that she supposes that at the time of the accident the lights inside were lighted but cannot say whether they were or not, this shows that she did not rely on the absence of a search light.

TORT for personal injuries from being knocked down by a car of the defendant going "very fast," "much faster than usual" or "twenty-five miles an hour" while the plaintiff, following a path which led to the mill where she worked, was attempting to cross the track of the defendant on Bruce Street in Lawrence, at about twenty minutes after six o'clock in the morning of November 28, 1904. Writ dated November 30, 1904.

At the trial in the Superior Court before *Bell*, J., the facts appeared which are stated in the opinion. At the close of the evidence the judge ruled that, while the evidence as to the negligence of the defendant was conflicting, there was not sufficient evidence of due care on the part of the plaintiff to warrant a

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submission of the case to the jury. He ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. P. Sweeney, for the plaintiff.

S. W. Emery, for the defendant, submitted a brief.

LORING, J. In the case at bar the plaintiff's path, as she approached Bruce Street, lay through vacant land, and her view of a car coming from the north was and continued to be unobstructed from the time such a car was eight hundred and fifty feet north of the point where the accident took place until it reached that point. The car here in question was lighted by thirteen incandescent lights inside the car and one on the dashboard. The accident happened in the morning, while it was still dark, and although it was "misty and cloudy," it was not the case of a fog which interfered with seeing objects, as was the case, for example, in *Barry* v. *Boston Elevated Railway*, 194 Mass. 265.

On the plaintiff's own story it is plain that she was negligent in not seeing the car, and that her negligence contributed to the accident. The case is covered by *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242. Such a case can be disposed of in one of two ways. It can be said that of necessity either she did not look or that she looked carelessly when she did look. Or it can be said that, taking the time which she selected as the time to look, the car must have been in plain sight and she must have looked carelessly.

In our opinion the former is the true point of view, and from that point of view the statement of the case is enough.

But as we have said, the result is the same whether the case is approached from the other point of view. The car must have been in plain sight at the time when the plaintiff says that she looked. It was visible eight hundred and fifty feet from the place of the accident. If the plaintiff was walking three miles an hour, it took her eleven and one third seconds to get to the point where the accident occurred, if she looked when she was fifty feet away, and thirteen and three fifth seconds if she looked when she was sixty feet away. To emerge from invisibility and run the intervening eight hundred and fifty feet during these eleven or thirteen and a half seconds the car would have had to run at the rate of nearly forty-five or thirty-seven and one third

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miles an hour. The highest speed of the car testified to was twenty-five miles an hour.

The fact principally relied on by the plaintiff's counsel in his argument was that the cars of the defendant railway had been equipped for about a year before the accident with a large carbon electric search light in front of a reflector on the front dasher, and that at the time of the accident the car in question had no such light, or, if it had, it was not lighted. But the plaintiff did not testify that she knew of this and knowing of it relied on it. On the contrary, all that she testified to on that point was that when she used to see the car in October (the month before the accident) "they had a small light on it," and that she supposed that the lights inside were lighted up then but could not say whether they were or were not. The case at the bar therefore is not a case where the plaintiff relied on the search light, and in this respect his case comes within *Connolly* v. *New York & New England Railroad*, 158 Mass. 8.

The case at bar does not come within *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. That also was the case of a brilliantly lighted car, although that fact does not appear in the report of the case. The plaintiff there made out a case for the jury on the issue of the accident not being caused by his contributory negligence, because he relied on one Helchier, who was driving the wagon in which the plaintiff was seated, and "If the plaintiff's testimony is to be believed, Helchier, at several points on Academy Lane, as he was approaching Sudbury Road, looked for the car; he was listening all the time and he heard no gong or whistle or anything else indicating the approach of a car; while at some points he could see two or three hundred feet up the track on Sudbury Road, his view was wholly obstructed at others; and as he came near the corner of the two streets and near the track the view was much obscured by overhanging trees, both upon the lane and upon the road." pp. 78, 79. "The evidence tended to show that a person travelling upon the lane could have only a very imperfect view up Sudbury Road, the view being entirely cut off at some points by houses and greatly obscured at others by overhanging trees located upon the south side of the lane and the west side of the road." pp. 79, 80. In the case at bar the plaintiff's view was unobstructed.

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Neither does the case come within *Beale* v. *Old Colony Street Railway*, 196 Mass. 119. In that case the plaintiff was a boy seven years and six weeks old; he was following a tip-cart, and there were "overhanging bushes, fences, trees and other obstructions to the view of the approaching car."

Exceptions overruled.

MARY B. SAUVAN *vs.* CITIZENS' ELECTRIC STREET RAILWAY COMPANY.

ARTHUR V. SAUVAN *vs.* SAME.

Essex. November 13, 1907. — January 13, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence. Street Railway. Carrier.

It is no evidence of negligence on the part of the conductor of a street car that under circumstances in no way unusual he gave the signal to start the car after a healthy and unincumbered woman passenger had got fully and fairly upon the car and was proceeding to walk to a seat.

TWO ACTIONS OF TORT, the first by Mary B. Sauvan for personal injuries incurred on April 9, 1905, while she was a passenger on a car of the defendant, after she had got upon the car at a regular stopping place when the car was standing still, from the car starting while she was proceeding to her seat, and causing her to fall or be thrown backward against the woodwork inside the car, and the second action by the husband of the plaintiff in the first case for the loss of her services. Writs dated April 26, 1905.

In the Superior Court the cases were tried together before *Wait*, J. At the close of the evidence the judge refused to rule at the request of the defendant that the plaintiff could not recover, and the defendant then asked for sixteen rulings, of which the four that are mentioned in the opinion were as follows:

"4. The defendant company having stopped its car to let the plaintiff on, was bound to keep that car standing until the plain-

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tiff had got entirely upon the car, but the defendant company was under no obligation to the plaintiff as a passenger to hold its car standing until the plaintiff had seated herself in the car."

"7. The conductor was under no obligation to wait until Mrs. Sauvan had become seated before giving the signal to start.

"8. The conductor was not negligent in starting the car when he did.

"9. I direct you as a matter of law that there is no evidence of negligence in this case on the part of the conductor of the car."

The judge refused to make any of these rulings, and left the case to the jury with other instructions. The jury returned a verdict for the plaintiff in the first case in the sum of $1,437, and a verdict for the plaintiff in the second case in the sum of $614. The defendant alleged exceptions.

The case was submitted on briefs.

G. Murchie, for the defendant.

J. H. Casey, *N. N. Jones & E. Foss*, for the plaintiffs.

LORING, J. By the plaintiffs' evidence Mrs. Sauvan (who will be spoken of hereafter as the plaintiff) had stepped up over the steps into the vestibule and was fairly and fully on the floor of the vestibule of the car before the conductor rang the starting bell. What she complains of is that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight on to that foot, and was in the act of bringing the other foot up and forward. Her contention is that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers.

If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or at any rate it might well be contended that the conductor could not have anticipated such an instantaneous response to his signal. But apart from that, it is settled in this Commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car. *Weeks* v. *Boston Elevated Railway*, 190 Mass. 563.

In the case of *Gordon* v. *West End Street Railway*, 175 Mass.

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181, the passenger was in the act of getting on to the car. In *Hamilton* v. *Boston & Northern Street Railway*, 193 Mass. 324, it was not wholly clear that the plaintiff was fully and fairly on the car in the first place; in the second place, the plaintiff was in the act of caring for her two years old child when the starting signal was given; and in the third place, the car was not to start under ordinary circumstances. It was at the beginning of a curve.

In the case at bar there were no extraordinary circumstances. It is stated in the bill of exceptions that "Mrs. Sauvan looked and was in perfect health at the time of the accident, and was a large, robust woman, weighing about one hundred and seventy pounds." For these reasons, at least four of the rulings asked for (namely, the fourth, seventh, eighth and ninth) should have been given.

No exception was taken to the portion of the charge as to the negligence of the motorman, which the defendant now complains of. The only exception taken by it was to the refusal to give the rulings asked for and to the charge, so far as it was inconsistent with them.

Exceptions sustained.

PATRICK MULVEY *vs.* CITY OF BOSTON.

Suffolk. March 15, 1907. — January 14, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Limitations, Statute of. Statute. Municipal Corporations. Constitutional Law. Words, "For," "Injury to the person."

The provision of St. 1902, c. 406, that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced within two years next after the cause of action accrues, is not restricted to actions for injuries to the person of the plaintiff, and includes an action at common law brought by a husband against a city for the loss of the services and society of his wife and the expenses for medical attendance resulting from injuries to her person caused by the negligence of employees of the water department of the defendant.

It is a general rule in the construction of statutes that they are intended to operate prospectively and not retroactively, and therefore that in the absence of an express provision to that effect they do not relate back so as to affect existing rights of property, but, in the prospective operation of a statute dealing only

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with remedies and the enforcement of rights, the future procedure under the new legislation is as applicable to previously existing substantive rights as to those afterwards acquired.

Statutes of limitation, where they contain no language clearly limiting their application to causes of action arising in the future, are construed to apply as well to causes of action which already have accrued as to those which may accrue afterwards, if sufficient time has been allowed between the passing of the act and the time fixed for the new limitation to take effect to afford full opportunity for all persons having such causes of action to bring their suits.

St. 1902, c. 406, provides that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced within two years next after the cause of action accrues." Under statutes previously in force such actions were barred only by the lapse of six years, and this statute took effect under the general law thirty days after its passage. *Held*, that, assuming that rights of action against counties, cities and towns for injuries to the person which had accrued at the time of the passage of the act were sufficiently rights of property to be entitled to protection under some of the provisions of the Declaration of Rights, the statute is not made unconstitutional by construing it to apply to such pending actions, because thirty days is not such an unreasonably short time for the bringing of suits in this Commonwealth on existing rights of action that the Legislature cannot prescribe that limit constitutionally.

TORT at common law against the city of Boston by the husband of Hannah Mulvey for the loss of her services and society and the expenses of medical attendence upon her resulting from an injury to her person on December 17, 1901, in a private way, due to the alleged negligence of employees of the water department of the defendant. Writ dated December 15, 1905.

The defendant pleaded among other things the statute of limitations.

At the trial in the Superior Court before *DeCourcy*, J., the defendant asked the judge to order a verdict for the defendant on the ground that the action was not brought within the time prescribed by law. The judge thereupon ordered a verdict for the defendant on that ground, and reported the case for determination by this court. If the ruling was right, judgment was to be entered for the defendant; if the ruling was wrong, by agreement of the parties judgment was to be entered for the plaintiff in the sum of $500.

The case was submitted on briefs at the sitting of the court in March, 1907, and afterwards was submitted on briefs to all the justices.

C. Toye, for the plaintiff.

P. Nichols, for the defendant.

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KNOWLTON, C. J. The report in this case presents the single question whether the plaintiff's action is barred by the statute of limitations. The action is by a husband, to recover for the loss of services of his wife and for the expenses of her illness resulting from an injury received by her through the alleged negligence of the defendant's servants. By the St. of 1902, c. 406, the statute of limitations was so amended as to require that "actions of tort for injuries to the person, against counties, cities and towns, shall be commenced only within two years next after the cause of action accrues." Under the statute previously in force such actions were barred only by the lapse of six years. R. L. c. 202, § 2, cl. 2.

The injury to the plaintiff's wife, on which his action is founded, was an injury to her person. The first question to be determined is whether the husband's action is for an injury to the person within the meaning of the statute. The language of the statute is not restricted to actions for injuries to the person of the plaintiff, and we think it is broad enough to include all actions of tort founded on injuries to the person of any one in such relations to the plaintiff that the injury causes him damage. There is nothing in the context to indicate that the words are used in a narrow sense, or that the actions referred to are only those brought by the person receiving the physical impact. The word "for" is used in its ordinary signification of "on account of," "because or by means of," or "growing out of." See *Strong* v. *Sun Ins. Co.* 31 N. Y. 103; *State* v. *Cornell*, 54 Neb. 647, 655. The term "action for a personal injury," or "for an injury to the person," has been given a meaning broad enough to include the present case in the following decisions: *Maxon* v. *Delaware, Lackawana & Western Railroad*, 112 N. Y. 559, *Hutcherson* v. *Durden*, 113 Ga. 987, *Bennett* v. *Bennett*, 116 N. Y. 584, 587, *Williams* v. *Williams*, 20 Col. 51, *Wightman* v. *Devere*, 33 Wis. 570, and *New* v. *Southern Railway*, 116 Ga. 147. While some of these cases may go further than we should be willing to follow, we have no hesitation in deciding that the present is an action for a personal injury, within the meaning of the statute.

In ascertaining the meaning of statutes it is a general rule that they are intended to operate prospectively and not retroac-

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tively. It follows, therefore, that, in the absence of an express provision to that effect, they do not relate back, to change previously existing substantive rights of property. Most such rights cannot constitutionally be affected by legislation. But in the prospective operation of a statute which deals only with remedies and the enforcement of rights, the future procedure under the new legislation is as applicable to previously existing substantive rights as to those afterwards acquired. Statutes of limitation relate only to the remedy, and they control future procedure in reference to previously existing causes of action. This is the general rule in regard to such statutes, where they contain no language clearly limiting their application to causes of action arising in the future. In *Brigham* v. *Bigelow*, 12 Met. 268, 275, Chief Justice Shaw said, in regard to a change of the statute of limitations, "If, then, the statute has no effect on the contract which is passed when it is made, but only on the remedy which is then future, it has no retrospective operation and cannot be avoided on that ground." In *Darling* v. *Wells*, 1 Cush. 508, 510, we find these words: "The whole effect of the new statute was prospective, as it regarded an action to recover an existing debt not barred at the time, and therefore it was not open to the objection against retroactive laws." To the same effect is *Loring* v. *Alline*, 9 Cush. 68, in which Chief Justice Shaw said, "Indeed, we think it the common practice and open to no objection, in passing a statute of limitation, to make it apply as well to causes of action which have already accrued as to those which may afterwards accrue, if sufficient time be allowed between the passing of the act and the time fixed for the limitation to afford a full and ample time to all persons having such causes of action to commence their suits." Other cases in which the same principle is applied are, *Smith* v. *Morrison*, 22 Pick. 430; *Wright* v. *Oakley*, 5 Met. 400, 407; *Willard* v. *Clark*, 7 Met. 435; *O'Gara* v. *Neylon*, 161 Mass. 140; *Bigelow* v. *Bemis*, 2 Allen, 496.

The case of *King* v. *Tirrell*, 2 Gray, 331, relied on by the plaintiff, is not at variance with this doctrine. The statute considered in it, reducing the time within which certain actions could be brought, applied as well to existing as to future causes of action. This is made plain in *Bigelow* v. *Bemis*, 2 Allen, 496.

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The language of the act was held applicable only to cases in which the bond of the executor or administrator was given subsequently to the enactment; but in all such cases the new limitation of time applied to causes of action existing before the enactment as well as to those accruing afterwards. This provision of the statute was changed by the St. 1855, c. 283, so as to exclude from the limitation pre-existing causes of action, and this last act was subsequently repealed by the Gen. Sts. c. 182.

The only difficult question in the present case arises from the fact that there might be claims which had existed without suit nearly two years before the act took effect, and which would therefore be barred by the statute quickly. Upon these a suit could be brought, after the passage of the act, only during the period of thirty days between the time of its passage and the time of its taking effect. There is ground for an argument that this time is too short to be reasonable, and that a statute limiting the rights so closely would be unconstitutional. It may be contended, either that the statute must be construed as not applying to existing causes of action because the Legislature must have intended it to have a meaning which would leave it valid, or, if it is given a different meaning, that it must be set aside as unconstitutional.

A statute declaring that a period already elapsed should bar an action upon a contract would be an arbitrary destruction of contractual rights, and would be unconstitutional. *Brigham* v. *Bigelow*, 12 Met. 268, 273. *Sanford* v. *Hampden Paint & Chemical Co.* 179 Mass. 10, 14. *Sohn* v. *Watterson*, 17 Wall. 596. *Terry* v. *Anderson*, 95 U. S. 628. *Turner* v. *New York*, 168 U. S. 90. *Saranac Land & Timber Co.* v. *New York*, 177 U. S. 318. *Wilson* v. *Iseminger*, 185 U. S. 55. *Soper* v. *Lawrence*, 201 U. S. 359, 369, 370. But if a reasonable time is allowed within which an action may be brought after the passage of the statute, the act is unobjectionable. Most of the cases in which this constitutional question is discussed refer to that provision of the Constitution of the United States which forbids the passing of laws "impairing the obligation of contracts." Art. 1, § 10. The question might be raised under art. 14 of the amendments of the Constitution, which provides that no State shall "deprive any person of life, liberty or property without due pro-

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cess of law." A claim in an action of tort for a personal injury plainly would not come within the first of these constitutional provisions. Whether it would come within the second, or any other, may not be free from doubt. In some senses of the word such a claim is not property. It is not assignable, and it cannot be appropriated by creditors in proceedings in bankruptcy or insolvency. At common law it does not survive, although it does under our statute. R. L. c. 171, §1. But at common law it is a valuable personal right. If we treat it as within the protection of some of the broad provisions of the declaration of rights in the constitution of Massachusetts, we come to the question whether thirty days is so plainly an unreasonably short time to allow for the bringing of an action to one who has held his claim nearly two years without carrying it into court, that the Legislature cannot constitutionally prescribe a limitation to this period.

In *Smith* v. *Morrison*, 22 Pick. 430, 433, the court said, "Whether the time allowed for creditors to commence their actions was a reasonable time or not was a question within the exclusive province of the Legislature to determine." In *Wilson* v. *Iseminger*, 185 U. S. 55, there is a more accurate statement, as follows: "What shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."

A claim for a personal injury is one about which the claimant cannot fail to have full knowledge in ordinary cases. The bringing of an action on such a claim is not a matter of complication, but is a very simple proceeding that requires no considerable time. There are very important reasons why claims of this kind, if intended to be enforced, should be presented promptly. So strong are these reasons that we have had, for many years, statutes providing that, if formal proceedings are not taken for the enforcement of the remedy within thirty days, and in some cases within sixty days, the right is lost. This has long been the law as to all claims against cities and towns and other corporations for injuries received from defects in highways, as to claims for personal injuries under the employers' liability act, and for injuries resulting in death without conscious suffering,

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and perhaps for some others. R. L. c. 51, §§ 20, 21; c. 106, § 75. These are in the nature of statutes of limitation of all such claims, which make it necessary to begin proceedings to enforce them within thirty days, or sixty days, as the case may be, by giving a notice in writing. The validity of these statutes has been upheld in many decisions. They are legislative declarations that thirty days is a reasonable time within which to be obliged to commence proceedings upon such claims against counties, cities and towns, if they are to be enforced.

It has also been a part of the policy of our law, for many years, that, in the absence of a special provision to the contrary, new laws affecting important rights of the person or of property shall take effect at the expiration of thirty days from the time of their passage. R. L. c. 8, § 1. The reasonableness of the limitation, in a statute like that before us, depends largely upon the place, and its geographical extent and condition. The time given in such a statute in the small State of Massachusetts, covered with railroads, and postal and telegraph lines, and full of newspapers, might be quite reasonable, when five times as long might be needed in some of the western or southern States. *McGahey* v. *Virginia*, 135 U. S. 662, 707. In *The Ydun*, [1899] P. D. 236, the English court of appeal held that a statute limiting an existing cause of action to twenty-six days was controlling. This, of course, was not under a written constitution, but the principle involved was similar to that which should govern us.

The fact that the time allowed under this statute is the thirty days between the passage of the law and the day when it takes effect, instead of the same length of time expressly given by the terms of the act, is immaterial. This point is covered by the decisions in *Smith* v. *Morrison*, 22 Pick. 430, and *Bigelow* v. *Bemis*, 2 Allen, 496. See also to the same effect, *Stine* v. *Bennett*, 13 Minn. 153; *Duncan* v. *Cobb*, 32 Minn. 460; *Korn* v. *Browne*, 64 Penn. St. 55; *Clay* v. *Iseminger*, 187 Penn. St. 108; *S. C. sub nom. Wilson* v. *Iseminger*, 185 U. S. 55; *Hedger* v. *Rennaker*, 3 Met. (Ky.) 255, 258; *Lockhart* v. *Yeiser*, 2 Bush, 231; *Eaton* v. *Supervisors*, 40 Wis. 668; *Horbach* v. *Miller*, 4 Neb. 31; *Wrightman* v. *Boone County*, 82 Fed. Rep. 412; *Merchants National Bank* v. *Braithwaite*, 7 N. D. 358, 372; *Osborne* v. *Lindstrom*, 9 N. D. 1, 8.

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There are decisions in distant jurisdictions where conditions are different from those in Massachusetts, some of which hold that a longer time than thirty days within which one may sue is necessary to the validity of the statute. *Berry* v. *Ramsdall*, 4 Met. (Ky.) 292. *Lamb* v. *Powder River Live Stock Co.* 132 Fed. Rep. 434. See *Stine* v. *Bennett*, 13 Minn. 153; *Smith* v. *Packard*, 12 Wis. 371, 412; *Horbach* v. *Miller*, 4 Neb. 31; *Myers* v. *Wheelock*, 60 Kans. 747; *Power* v. *Kitching*, 10 N. D. 254; *Wheeler* v. *Jackson*, 137 U. S. 245. The cause of action in the present case was not barred until the expiration of one year and seven months after the statute was passed. Probably only a few persons in the State were so situated as to be limited by the act to thirty days for the bringing of an action upon any existing cause of action. A majority of the court are of opinion that the statute is not unconstitutional because such persons were so limited by it. The argument that the Legislature intended to apply it only to causes of action arising in the future, because otherwise it would be unconstitutional, cannot prevail.

Judgment for the defendant.

W. HARVEY MERRILL *vs.* POST PUBLISHING COMPANY.

Essex. November 6, 1907. — January 14, 1908.

Present: KNOWLTON, C. J., LORING, BRALEY, & RUGG, JJ.

Libel and Slander.

Allegations, contained in the declaration in an action of tort for libel, that the defendant falsely published in a newspaper that the plaintiff's sister and father had for ten years occupied one half of a house, the other half of which was occupied by the plaintiff's cousin, and that the two families had used the same halls, entrances and yard, but had not spoken to each other during that period, the same article stating that the plaintiff lived in another part of the city and that the cousin always spoke to him and "sympathized in his trouble," are not sufficient for the maintenance of the action.

A declaration in an action of tort for libel alleged that the defendant falsely published in a newspaper a certain article "of and concerning the plaintiff in conjunction with his sister also mentioned in said libellous publication." The article in a variety of ways stated that the sister had been arrested for stealing letters from the post-office. The defendant demurred. *Held*, that the alleged

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statements might be a libel on both the plaintiff and his sister and well might be found to impair the standing of the plaintiff in the community although they did not affect his character, that therefore they were libellous as to him, and that the demurrer should be overruled.

A defendant in an action of tort for libel is liable for what is insinuated as well as for what is stated explicitly in the alleged libellous statement.

A declaration in an action of tort for libel alleged that the plaintiff was the postmaster of Salem, that the defendant, "contriving and maliciously designing to injure the plaintiff in his office as postmaster, and to disqualify him for and to imply misconduct by him in his office," published in a newspaper of wide circulation an article stating that the plaintiff's sister had been arrested "for stealing letters," that the plaintiff or his wife sold real estate at a sacrifice, that "some do not hesitate to call [the sister] a 'martyr,' a woman who placed herself in a compromising position in order that she might help others, (meaning the plaintiff)." The defendant demurred. *Held*, that it could not be said as a matter of law that "others" did not mean the plaintiff or that the count did not allege an insinuation that the plaintiff's difficulties were such that his sister stole in order that she might help him out of them, and that therefore the demurrer must be overruled.

A declaration in an action of tort for libel which alleged that the defendant published of the plaintiff, "he is now ill with disease" (meaning the infectious disorder) "and worn with care," does not set forth a statement of the defendant charging the plaintiff with having an infectious disease.

TORT for a libel alleged to have been printed concerning the plaintiff by the defendant in a newspaper called the Boston Sunday Post. Writ in the Superior Court for the county of Essex, dated September 2, 1904.

The material allegations of the first count of the declaration were that the plaintiff was the postmaster of Salem, and was "the person referred to in the herein alleged libel as postmaster, W. H. Merrill, and Harvey Merrill, and brother of Sophie Merrill"; that "the matter hereinafter charged to be libellous was published by said defendant of and concerning the plaintiff, in conjunction with his sister also mentioned in said libellous publication." The publication complained of was annexed to the first count and referred to therein as "Exhibit A." Its first sentences were: "Blood relatives and co-heirs, living together in the house jointly owned for over twenty years, and not having spoken to each other for over ten long years, is the strange story of Salem's divided house, of which Miss Sophie Merrill, now out on bail in connection with thefts from the Salem post-office, is a member.

"She and her father, William H. Merrill, occupying and owning half of the house 12 Liberty Street, and her cousin, John

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Barker, occupying and owning the other half, have lived under the same roof, used the same entrances and the same yard, have passed each other in the entries of the house day in and day out, and have never exchanged even a syllable in all that long ten years."

Then followed an account of how the plaintiff's father and mother and sister Sophie came to own and occupy one half of the house, and John Barker and his mother came to own and occupy the other half, it being stated that they were all descendants of one Jonathan Merrill, and that, for a time after his death, the Barkers lived in New Hampshire, at which time "Harvey Merrill, the present postmaster, and his sister Sophie, now a recluse, under the cloud of shame and disgrace, often visited their boy cousins on the New Hampshire farm, and fruits and vegetables were often shipped by the Barker boys to their Salem cousins"; that, after the death of John Barker's father, he and his mother moved to Salem and occupied the other side of the house from that occupied by the father, mother and sister of the plaintiff, that, while Mrs. Merrill and Mrs. Barker lived, "everything was pleasant." "Both, however, died, and but a short time after the death of Mrs. Barker there began the ten years' silence that up to the present time has never been broken, not even at the time of the latest family trouble, the sensational arrest last winter of Miss Sophie Merrill, the postmaster's little old maid sister, for stealing letters." . . . "Neither of the Barker brothers ever spoke or had anything at all to do with Sophie Merrill or her father, but were and are, nevertheless, on good terms with Postmaster Harvey Merrill and all his family, who live in South Salem."

There then followed an account of events with regard to some property in East Boston, owned jointly, as was the Salem house, by the Merrills and the Barkers, "which, after the arrest of Miss Merrill, it was discovered had passed out of their [the Barkers'] hands unknowingly." "After the death of Mrs. Barker it is claimed that Miss Merrill collected the rents, and that the Barker brothers were given to understand, from time to time, that the house was untenanted, that they received but a trivial amount of money after their mother's death as their share of the income. After Miss Merrill's arrest — in anticipation of a need for money — her brother is said to have proposed to his cousins

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selling the property in East Boston. They agreed, and then it was suddenly discovered that the house which they still supposed was theirs, had gone into other hands, having been sold for taxes, which they supposed had been paid all along. . . . The discovery of the passing of this property, and the subsequent discovery which it is claimed they made that the property had not been untenanted for many years, is further said to have added intensity to the feud of this divided house. Ever since Miss Merrill, to the great surprise of all who knew her, was arrested, charged with the theft of mail matter from the post-office, of which her brother is the official head, many sensational stories have been afloat. . . . Since the arrest, and her subsequent self-imposed imprisonment in her home, which she has never left since the day of her arrest, some of those who comprised the small circle of this reticent little woman's friends have deserted her in her hour of trouble and misfortune. The veil of mystery seems to surround the strange case of Sophie Merrill, who, on an income of $900 a year, was, it is alleged, forced to steal in order to live. It has been predicted, hundreds of times, that Sophie Merrill, the little maiden woman, with worn face and large sympathetic eyes, who dressed shabbily, rather than as if she earned a good salary, would never be tried. Such a thing would surprise no one and would relieve many; for, while there are always people to raise an argument on both sides, and while she herself is little known, Postmaster Merrill's friends are legion, and there is great sympathy for him, in view of what was to him a great and unexpected blow. After his sister's arrest he or his wife, to whom the property belonged, sold five houses in South Salem at a sacrifice, for the same reason, it is said, that he desired to turn the East Boston house into cash. For a long time after his sister's arrest Mr. Merrill called every day to see her, and, although John Barker, in passing in and out of his own half of the house, never spoke to the woman, whom he blames for the present curious condition of tenants who are living together as enemies, and have been for ten years, he always spoke to his cousin, the postmaster, in whose trouble he sympathized. At present this 'divided' house is indeed a veritable house of trouble. Even Postmaster Merrill, a man with a sunny disposition and an unusual number of friends, has enemies. He has lost a fortune

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in his lifetime, and is said to be heavily burdened with debt, besides which he is heavily weighed down by the crushing calamity that has fallen upon him. As for his sister, there is a wide diversity of sentiment regarding her unfortunate situation. Some look upon her as a woman who is mentally upset and thus did not realize what she was doing. Some do not hesitate to call her a 'martyr,' a woman who placed herself in a compromising position in order that she might help others, and there are always some who completely overlook the sentimental or the sympathetic side, and see only the naked facts. . . . How all this will end — the real story as to whether Sophie Merrill had or had not a clear and definite motive when she took the letters she did in the Salem post-office — is as much the mystery of Salem's queer 'divided' house as the origin of that strange feud which for years has existed, all unsuspected, under the roof tree of one of the city's most interesting houses."

The allegations in the second count were that the defendant published an article containing the statements set forth in the opinion, "contriving and maliciously designing to injure the plaintiff in his office as postmaster aforesaid and to disqualify him for and to imply misconduct by him in his office."

The third count alleged that the defendant caused to be published "a false and malicious libel concerning the plaintiff in the following words, to wit: 'her gray-haired brother' (meaning the plaintiff), the 'postmaster' (meaning the plaintiff), 'who' (meaning the plaintiff) 'used to be noted for his happy genial smile, his debonair little air, but who' (meaning the plaintiff) 'is now ill with disease' (meaning the infectious disorder and meaning the plaintiff) 'and worn with care' (meaning the plaintiff).

The defendant demurred to the declaration and the demurrer was sustained by *Fox*, J. Judgment was entered for the defendant, and the plaintiff appealed.

H. Dunham, for the plaintiff.

J. T. Pugh, for the defendant.

LORING, J. It is alleged in the first count, which by reference sets forth at length the whole article published in the defendant's newspaper, that this article was published "of and concerning the plaintiff, in conjunction with his sister also mentioned in said libellous publication."

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We are of opinion that as matter of law there is nothing in what is there written as to the mystery of the divided house, No. 12 Liberty Street, Salem, which is a libel on the plaintiff. It is not stated that the plaintiff lived at that house during the time in question. It was Sophie and her father and John Barker and his mother who originally lived in the two halves of that house, and the period of ten years' silence between the two families began about 1894, when John Barker's mother died. During this time the plaintiff lived "in South Salem," and it is stated that after Sophie's arrest John Barker "always spoke to his cousin, the postmaster, in whose trouble he sympathized."

If the first count sets forth a libel on the plaintiff, it is in substance because, in a variety of ways, the article in question states "of and concerning the plaintiff," that his sister Sophie has been arrested for larceny of letters from the post-office.

The defendant's argument is that this is a libel on Sophie and not on the plaintiff.

This is undoubtedly a libel on Sophie, but it does not necessarily follow that it is not a libel on the plaintiff also. See *Dow* v. *Long*, 190 Mass. 138.

To write of a man that he is the brother of a sister arrested for larceny might well be thought by a jury "to impair his . . . standing in the community," to use the language employed by this court in *Bishop* v. *Journal Newspaper Co.* 168 Mass. 327, 331, 332.

In almost every case of libel the reputation of the plaintiff as to character is attacked. The case at bar presents the question whether there are not statements which affect a person's standing in the community which do not affect his character. And we are of opinion that there are. It was so decided in *Shelby* v. *Sun Printing & Publishing Association*, 109 N. Y. 611, affirming "on opinion below" the decision of the Supreme Court, reported in 38 Hun, 474. The libel in that case consisted in stating that the plaintiff and his sister "are illegitimate children of the adopted father's intimate friend." In the court below it was stated that: "In this case there was no charge against the integrity or morality, or behavior or reputation, of the plaintiff. The statement is that she is illegitimate, a circumstance over which, of course, she could have no control, and for which she was personally in no

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way whatever responsible. In the estimation of mankind, however, as it is understood, the assertion that a person is illegitimate is a reproach, and one which might, in all probability, frequently subject the person of whom it is said to contumely, to indignity, and, perhaps, to insult. It is unfortunate to be obliged to take this view of human conduct, but we must take the world as we find it, and reason out the problems which are presented to us with reference to human frailties or human prejudices, whatever may be the designation given to a disposition often exhibited to make a person suffer for the deeds of his ancestors." And in support of that conclusion Starkie on Slander & Libel, (Am. ed. of 1830) 166, and the cases of *Cropp* v. *Tilney*, 3 Salk. 226, and *Villers* v. *Monsley*, 2 Wils. 403, were there cited. See also in this connection Wythens, J., in *Baldwin* v. *Flower*, 3 Mod. 120; Odgers, Libel & Slander, (4th ed.) 16.

The statement that the plaintiff is a bastard is not the only statement which affects his standing in the community. We cannot doubt that it would be a libel to publish of a white man that he is a negro. A negro may be far more noble in character than the white plaintiff; but that is not the question. If a plaintiff is stated in writing to be a negro when he is in fact a white man, his standing in the community is or may be affected.

In our opinion the same is true of a written statement that the plaintiff's father and mother and other ancestors were criminals, and in a less degree, as in the case at bar, that a brother or sister is a criminal or has been arrested for crime.

The defendant has cited the case of *Subbaiyar* v. *Kristmaiyar*, Ind. L. R. 1 Madr. 383, as a decision to the contrary. That was a case where a brother brought an action because the defendant had uttered a defamatory statement as to his sister. The defamatory statement in that case was made of the sister and not of the plaintiff, and the plaintiff's name was not mentioned in connection with the statement in question. All that was decided in that case was that, to be the foundation of an action, the defamatory words complained of must have been spoken of the plaintiff. The decision was plainly right. To write of a woman that she has had an illegitimate daughter (who is not named) is a libel on the woman. But it is not a libel on the

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woman's illegitimate daughter, and, although it may hurt the daughter, she cannot sue the defendant because he has not published a libel of and concerning her. See in this connection the reasoning of Cranch, C. J., in *Johnson* v. *Brown*, 4 Cranch C. C. 235, 237. On the other hand, to write of the daughter that she is an illegitimate child, without naming the mother, is a libel on the daughter, as was held in *Shelby* v. *Sun Printing & Publishing Association*, 109 N. Y. 611, but it is not a libel on the mother. And although the mother may suffer she cannot sue, for the reason that the defamatory words were not written of her. The cases of *Luckumsey Rowji* v. *Hurbun Nursey*, Ind. L. R. 5 Bomb. 580, and *Sorensen* v. *Balaran*, 11 App. Div. (N. Y.) 164, are cases where the defamatory words were spoken of a deceased person, and they are decisions standing on the same footing as *Subbaiyar* v. *Kristmaiyar*, *ubi supra*, namely, that the defamatory words were spoken of the deceased person alone and were not spoken of the plaintiff.

The case at bar is a case where the defamatory words are alleged to have been published "of and concerning the plaintiff, in conjunction with his sister also mentioned in said libellous publication." It remains to consider whether that is legally possible; whether, for example, a written statement that a woman (naming her) has had an illegitimate daughter (naming her) is or may be a libel on both. We are of opinion that it may be, although the case of *Wellman* v. *Sun Printing & Publishing Association*, 66 Hun, 331, seems to be a decision to the contrary.

We are of opinion that we cannot withdraw the case stated in the first count from the jury. To do so we must be able to say that with respect to the plaintiff the publication is not reasonably capable of being understood in a defamatory sense. See *Twombly* v. *Monroe*, 136 Mass. 464, 469.

The second count does not purport to incorporate or to refer to Exhibit A annexed to the first count, and must stand on the allegations therein contained alone. *Farquhar* v. *Farquhar*, 194 Mass. 400. *Massachusetts Ins. Co.* v. *Green*, 185 Mass. 306, 310. This count contains many of the statements found in Exhibit A without the context there set forth. Some of them are unintelligible without the context. With the exception of one innuendo which we shall refer to later on, the others do not state a case

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unless one is stated in the first count. The allegation that these statements were made "of and concerning the plaintiff in his office of postmaster" does not add to the allegations of the first count. In an action for slander words not actionable *per se*, if spoken in connection with the plaintiff's profession and business and followed by special damage, are actionable. See for example *Morasse* v. *Brochu*, 151 Mass. 567. But the words here complained of were printed, and this is an action for libel, not slander.

Two statements are unintelligible, one because there is no end to the sentence, the other because there is no beginning.

The words "now a recluse," plainly refer to the sister only.

In this count it is alleged that the newspaper article complained of, after stating that the plaintiff's sister had been arrested "for stealing letters," and that the plaintiff "or his (meaning the plaintiff's) wife, to whom the property belonged, sold five houses in South Salem at a sacrifice, for the same reason, it is said, that he (meaning the plaintiff) desired to turn the East Boston house into cash," continued: "'As for his' (meaning the plaintiff's) 'sister, there is a wide diversity of sentiment regarding her unfortunate situation. Some look upon her as a woman who is mentally upset, and thus did not realize what she was doing. Some do not hesitate to call her a "martyr," a woman who placed herself in a compromising position in order that she might help others,' meaning the plaintiff." We cannot say that the jury could not find that "others" meant the plaintiff, and that this count does not allege by insinuation that the plaintiff's difficulties were such that his sister stole that she might help him out of them. A defendant is liable for what is insinuated as well as for what is stated explicitly. *Twombly* v. *Monroe*, 136 Mass. 464. *Haynes* v. *Clinton Printing Co.* 169 Mass. 512. To write of a man that he was in such difficulties that his sister stole to help him out of them might be thought by the jury to be libellous. See in this connection *Martin* v. *Press Publishing Co.* 93 App. Div. (N. Y.) 531.

As to the third count, the article complained of did not charge the plaintiff with having an infectious disease.

At the argument the plaintiff waived his appeal from the

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judgment of the Superior Court in favor of the defendant on the fourth count.

It follows that the entry must be

Judgment for the defendant on the third and fourth counts affirmed; judgment for the defendant on the first and second counts reversed.

ATTORNEY GENERAL *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 22, 1907. — January 14, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Quo Warranto. Corporation, Ultra vires acts. *Attorney General. Equity Jurisdiction,* To restrain corporations from transacting unauthorized business. *Statute. Supreme Judicial Court. Railroad Commissioners. Railroad.*

It seems that, before the enactment of St. 1906, c. 372, giving to the Supreme Judicial Court jurisdiction, upon an information in equity in the name of the Attorney General at the relation of the commissioner of corporations, among other things to restrain any domestic corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter, the Attorney General on his own initiative, by quo warranto proceedings or by an information in equity in the nature of quo warranto, might have procured a judgment or decree ousting a domestic corporation from exercising powers or franchises without right, although the unauthorized acts of the corporation did not warrant, and he did not seek, a forfeiture of the charter of the corporation.

A remedy by quo warranto will not be given where any other adequate relief is available.

St. 1906, c. 372, giving to the Supreme Judicial Court jurisdiction, upon an information in equity in the name of the Attorney General at the relation of the commissioner of corporations, among other things to restrain any domestic corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter, expressly covers all cases in which such assumption, exercise or transaction is not of so grave a character as, in the opinion of the Attorney General, to call for a forfeiture of the charter of the corporation; and therefore, since adequate relief is given thereby, quo warranto cannot be maintained in such a case.

St. 1906, c. 463, Part I. § 8, providing that if a railroad corporation or street railway company, in the opinion of the board of railroad commissioners, has violated a law or neglects to comply with the terms of a statute, and continues to do so after notice from them, they shall present the facts to the Attorney General for his action, does not limit the authority of the Attorney General to bring inde-

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pendently proper proceedings to restrain unauthorized or illegal acts of such a corporation in any case where the interests of the public seem to him to require that he should do so.

QUO WARRANTO, on an information by the Attorney General, entered on the law docket of the Supreme Judicial Court for the county of Suffolk January 18, 1907, alleging that the defendant, without any warrant or grant, was using the liberties, privileges and franchises of subscribing for, taking and holding stock and bonds, and guaranteeing bonds and dividends of certain street railway corporations, and had usurped such liberties, privileges and franchises; and praying that the defendant be excluded from such liberties, privileges and franchises.

The defendant demurred, alleging as causes for demurrer the following: "(1) The Attorney General hath no power or authority to bring or maintain this information in manner and form as he hath assumed to bring the same; (2) this court hath no jurisdiction to decide and adjudge the matter and things set forth in the information in manner and form as the same are therein set forth; (3) it does not by said information appear that the facts set forth therein as to a violation by this defendant of the law of the Commonwealth, or any facts relating to such violation, have been presented by the board of railroad commissioners to the Attorney General for his action; (4) said information does not set forth any facts upon which the judgment sought thereby can be rendered at the common law, or upon which any judgment at the common law can be rendered."

There was a hearing before *Rugg*, J., who reserved the case for determination by the full court.

D. Malone, Attorney General, (*F. B. Greenhalge*, Assistant Attorney General with him,) for the plaintiff.

J. H. Benton, Jr., for the defendant.

KNOWLTON, C. J. This is an information in the nature of a quo warranto by the Attorney General against a railroad company owning and operating a railroad in this Commonwealth by virtue of its incorporation under the laws of the Commonwealth. It alleges that the defendant "has directly and indirectly subscribed for, taken and held the stock and bonds and has guaranteed the bonds and dividends, and is guaranteeing the bonds and dividends of certain domestic corporations" named, which are

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street railway corporations incorporated under the laws of this Commonwealth. It alleges that this holding and guaranteeing is without authority of law and in violation of the St. 1906, c. 463, Part II. § 57. It also alleges that the defendant is using, without any warrant or grant, the liberties, privileges and franchises of subscribing for, taking and holding the stock and bonds, and guaranteeing the bonds and dividends of these street railway corporations, and has usurped and is usurping said liberties, privileges and franchises. The prayer is that the defendant be excluded from the said liberties, privileges and franchises, and for such other orders and decrees as law and justice may require.

A demurrer was filed for four causes therein stated. Of these the third was waived, and the first and second are the same in substance; so that the two questions for consideration under the demurrer as stated in the defendant's brief are: "First, can the information, in the manner and form in which it is brought, be maintained as an information at the common law? Second, if the information can be maintained as an information at the common law, does it set forth facts upon which the judgment asked for therein can be rendered at the common law, or upon which any judgment at the common law can be rendered?"

Except for the alleged limitations in the statutes hereinafter referred to, no question is made as to the power and authority of the Attorney General to bring, in his own name and upon his own initiative, an information in the nature of quo warranto against a corporation which has abused or misused its corporate franchise, or has usurped a franchise not granted to it, with such injurious consequences to the public as to justify a forfeiture of its charter. His general authority in this particular is well established. *Goddard* v. *Smithett*, 3 Gray, 116, 122. *Attorney General* v. *Sullivan*, 163 Mass. 446, 448.

The question raised by the first ground of demurrer depends, first, upon the fact that the acts complained of are such as might lawfully be done by a natural person, although *ultra vires* of the corporation and having no direct relation to the object for which it was chartered, and secondly, upon the further fact that under the statute such corporations are forbidden to do these acts. The Attorney General does not aver that the acts are of such a character as to require a forfeiture of the original franchise

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granted to the corporation, but asks that it be excluded from these "liberties, privileges and franchises." This means, we suppose, that it be restrained from doing the acts; or, if the conduct of the corporation be treated as the exercise of a usurped franchise, that it be ousted from this franchise.

Our statutes and decisions do not deal directly with this question, (R. L. c. 156, § 3; c. 192, § 6,) and the decisions that bear upon it in England and in other States are not uniform. In the English courts, such conditions would seem to call for an information in equity by the Attorney General, while in this Commonwealth, under the statutes existing when the cases arose, such informations have been sustained only in cases of public nuisance and public charitable trusts. *Attorney General* v. *Tudor Ice Co.* 104 Mass. 239, 244. *Attorney General* v. *Pitcher*, 183 Mass. 513, 520. *Attorney General* v. *Great Northern Railway*, 1 Dr. & Sm. 154. *Attorney General* v. *Mid Kent Railway*, L. R. 3 Ch. 100. It has been held in many States, sometimes under local statutes, that the exercise of powers by a corporation which are not authorized by its charter, but which do not affect the public interest so injuriously as to warrant an ouster from its corporate franchise, may be restrained on an information in the nature of quo warranto, to oust it from the enjoyment of the usurped franchise. *State* v. *Portland Natural Gas & Oil Co.* 153 Ind. 483. *People* v. *Utica Ins. Co.* 15 Johns. 358. *State* v. *Standard Oil Co.* 49 Ohio St. 137. *Stewart* v. *Father Mathew Society*, 41 Mich. 67. *People* v. *Dashaway Association*, 84 Cal. 114. *State* v. *Norwalk & Danbury Turnpike Co.* 10 Conn. 157. *Illinois Midland Railway* v. *People*, 84 Ill. 426. *People* v. *North Chicago Railway*, 88 Ill. 537. For a different view see *State* v. *Minnesota Thresher Manuf. Co.* 40 Minn. 213. Inasmuch as corporations derive their authority from the Legislature, they can exercise only such powers as are either expressly included in their franchise, or are fairly incidental to the enjoyment of it. An attempt to do that which is *ultra vires* is a usurpation of what would be a franchise if the right to do it had been granted. As was said by Mr. Justice Bradley in *California* v. *Central Pacific Railroad*, 127 U. S. 1, 41, "Corporate capacity is a franchise." So in *People* v. *Geneva College*, 5 Wend. 211, 218, it is declared that, "Every act of a corporation affecting the public is the exercise of

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a franchise." A remedy by quo warranto is given in most courts for the exercise of usurped powers by corporations, even when the consequences are not grave enough to justify a forfeiture of the charter. In proceedings by quo warranto under the R. L. c. 192, §§ 6 to 11, when the Attorney General does not intervene, there may be a judgment that the corporation be perpetually excluded from the exercise of the franchise or privilege not conferred by law, which it is found to have been exercising. But in such a case there cannot be a judgment of forfeiture. In this there is an analogy to the decisions in other States to which we have referred. If the Attorney General intervenes in proceedings under this statute, he may demand a judgment of fine and forfeiture if his case is made out.

Were it not for the St. 1906, c. 372, it would seem that, in a case like the present, the Attorney General might proceed by an information, and, if the unauthorized exercise of powers by the corporation was not of such a kind as to interfere seriously with the fulfilment by the corporation of the purposes of its creation, or to justify a forfeiture of its charter, he might ask for a judgment of ouster from the powers and franchises which it had exercised without right. Either such a remedy should be open at law, or it should be held that, since full jurisdiction in equity has been given to our courts, an information in equity of the nature of quo warranto may be maintained by the Attorney General.

But we do not find it necessary to decide this question. For the St. 1906, c. 372, was passed for conditions of this kind, and it expressly covers all cases in which the assumption or exercise of a franchise or privilege, or the transaction of an unauthorized kind of business is not of such a grave character as, in the opinion of the Attorney General, to call for a forfeiture of the corporate franchise. The material part of this statute is as follows: "Upon an information in equity in the name of the Attorney General, at the relation of the commissioner of corporations, the Supreme Judicial Court shall have power to restrain by injunction any corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by the charter of such corporation and the laws of this Commonwealth." The case stated and the relief called for in the present information are provided for in this statute through an informa-

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tion in equity. The remedy thus given is exclusive for this class of cases, where no relief is needed other than an injunction against such unauthorized acts in the future. A remedy by mandamus or quo warranto will not be given where any other adequate kind of relief is available. *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294. *Finlay* v. *Boston*, 196 Mass. 267. *Jaquith* v. *Fuller*, 167 Mass. 123. *Hill* v. *McKim*, 168 Mass. 100. *Fairweather* v. *McKim*, 168 Mass. 103. *Perry* v. *Hull*, 180 Mass. 547. Since the passage of this statute, the Attorney General cannot maintain an information at law in the nature of quo warranto, to prevent the exercise by a corporation of powers *ultra vires*, where he does not desire any other judgment against it.

We agree with the contention of the Attorney General that the St. 1906, c. 463, Part I. § 8, does not limit his authority to proceed independently of action by the railroad commissioners in any case where the interests of the public seem to him to require it. This section is simply a detail in the statement of the general supervisory powers and duties of the railroad commissioners.

Demurrer sustained.

COMMONWEALTH *vs.* HUGH J. MORRISON.*

Suffolk. November 18, 1907. — January 21, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Public. *Lunch Wagon*. *Hawkers and Pedlers*. *License*. *Municipal Corporations*, By-laws and ordinances. *Words*, "Hawkers and pedlers."

A license or permit to carry on the business of hawker and pedler, properly issued by authorities duly empowered to issue it, does not justify the holder thereof in maintaining a lunch wagon for hours at a time at one place within the limits of a highway.

As a matter of common knowledge, as well as according to the definition in R. L.

* After this decision was rendered, St. 1908, c. 360, was passed, providing for the licensing, under specified conditions, of any reputable person to maintain "a vehicle for the sale of food" in a part of a public highway, "provided that public travel is not incommoded thereby" and provided that no part of a highway, the fee in which is not owned by the city or town, shall be used unless the owners of land abutting thereon consent in writing to the granting of the license.

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c. 65, § 13, hawkers and pedlers are persons who travel about, either on foot or in wagons, carrying and exposing goods for sale, and generally, although not necessarily, attracting attention to their wares by outcry, sign or advertisement.

By Revised Ordinances of Boston of 1888, c. 24, § 3, and Revised Ordinances of 1895, c. 26, § 1, enacted under authority of St. 1885, c. 328, the board of police commissioners of that city were given the powers formerly vested in the board of aldermen or the mayor and aldermen in relation to licensing, regulating and restraining hawkers and pedlers, carriages, wagons and other vehicles, and such a license given in 1894 by the board of aldermen was of no effect.

The maintenance for personal profit within the limits of a highway of a lunch wagon consisting of a room set upon wheels containing a lunch counter and seats for customers, a stove, an urn for making coffee and windows through which, as well as at the counter, customers were served, which was drawn by a horse to a certain place upon the highway each night except Sunday at 6.30 o'clock and remained there until 5 o'clock the next morning, the horse being removed in the meantime, was *held* to be an obstruction of the easement of the public to the use of the way, and therefore not to be justified although the owner of the lunch wagon had received a permit from officers of the municipality in which the highway was who assumed to act under authority conferred by an ordinance, there having been no legislative authority for the ordinance.

COMPLAINT, taken and sworn to in the Municipal Court of the City of Boston December 29, 1905, for obstructing Adams Square, a highway in Boston.

On appeal to the Superior Court, the case was tried on agreed facts before *Brown*, J., upon whose refusal to direct a verdict of not guilty, the defendant submitted to a verdict of guilty, and the presiding judge reported the case for determination by this court.

The facts are stated in the opinion.

The case was submitted on briefs.

J. R. Murphy & W. A. Buie, for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

RUGG, J. The defendant is complained of for obstructing a highway in the city of Boston. The facts are that the defendant kept a lunch wagon upon a public way, known as Adams Square, in the night time. This wagon was a rectangular box-like structure, placed upon the four-wheel running gear of an ordinary wagon, and was drawn to Adams Square by a single horse harnessed into the wagon shafts in the usual way. The upper structure of the wagon had a door, or entrance, about midway on one side. There were six windows on one side and five on the other, and three on each end. The inside was fitted up with a counter at one end, behind which was a stove and an urn for

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making coffee and in front of which were six stools, on which people sat while eating. The rest of the interior was left empty for standing room. Every night, Sundays excepted, in the month of December, 1905, at about 6.30 o'clock, the wagon was placed in the same spot in Adams Square, and the horse was taken out and led away. About five o'clock each morning the horse was brought back, harnessed to the wagon and driven off. During the night the wagon remained in the same place, and was resorted to by people for food. The defendant served various kinds of foods to customers, who entered and ate in the wagon, and to others in the street, who were waited on through the openings in the side.

The defendant attempted to justify his acts by a permit issued to him in 1894 by the board of aldermen of the city of Boston, to stand a wagon in Adams Square between the hours of 6 P. M. and 5 A. M., and under licenses as a hawker and pedler from the street department and the board of health of the city of Boston. We assume that the licenses or permits issued to the defendant as hawker and pedler by the health department and the street department were properly issued pursuant to a legal ordinance covering the subject, and that, notwithstanding considerations hereinafter discussed, it is within the jurisdiction of the city council of the city of Boston to enact limiting ordinances respecting hawkers and pedlers. *Commonwealth* v. *Ellis*, 158 Mass. 555. *Commonwealth* v. *Reid*, 175 Mass. 325. Standing alone, the licenses or permits as hawker and pedler gave the defendant no authority to set up a lunch wagon within the limits of the highway for hours at a time, nor to commit any obstruction in the public street. The character of the business conducted by the defendant, which was always at a fixed place and from a room, which, although set upon wheels, had characteristics of a shop or eating house, does not come within the description of business done by hawkers and pedlers, who, as a matter of common understanding as well as of statutory definition (R. L. c. 65, § 13), are persons who travel about, either on foot or in wagons, carrying and exposing for sale goods, and generally, though not necessarily, by outcry, sign or advertisement, attracting attention to their wares. *Commonwealth* v. *Ober*, 12 Cush. 493. *Commonwealth* v. *Hana*, 195 Mass. 262. The licenses as hawker and

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pedler are no greater protection to the kind of business which the defendant carried on than they would be to a common victualler.

A short answer to the defendant's further contention, that he is protected by the permit from the board of aldermen, is that the board of aldermen had no jurisdiction to grant the permit upon which he relies, even if we assume that the defendant's place of business can be properly comprehended within the generic phrase, carriage, vehicle, wagon, cart or coach. The first statutory provision respecting this subject appears to be in St. 1799, c. 31, § 7, although there were earlier acts respecting hackney carriages, St. 1795, c. 51, St. 1796, c. 32. This statute imposed a fine for permitting "any Cart, Waggon, Stage or Hack Coach, Stage Waggon or other Carriages, new or old, finished or unfinished" to remain more than one hour in any street, lane or alley in Boston without permission of the surveyors of highways, with a provision, manifestly intended for the protection of country folk, that no prosecution should be commenced "against any Driver of any Cart or Waggon coming from the country" unless specially directed. This section was repealed by St. 1847, c. 224, § 3, other sections of which chapter conferred upon the mayor and aldermen of cities general power for the regulation of all sorts of carriages and vehicles. St. 1878, c. 244, authorized the appointment of a board of police commissioners by the mayor for the city of Boston, and empowered the city council to confer upon such board all the powers possessed by the board of aldermen "in relation to licensing, regulating and restraining, . . . hawkers and peddlers, carriages, wagons and other vehicles." Acting apparently upon the authority conferred by this section, c. 24, § 3, of the Revised Ordinances of the city of Boston of 1882, being the eighth revision, provided that the board of police commissioners "shall have and exercise all the powers conferred by the statutes of the Commonwealth and the ordinances of the city upon the board of aldermen or upon the mayor and aldermen, in relation to licensing, regulating, and restraining . . . hawkers and peddlers, carriages, wagons and other vehicles." So far as this subject is concerned, substantially the same provision is contained in c. 26, § 1, of the Revised Ordinances of 1885, being the ninth revision. By

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St. 1885, c. 323, a board of police was created for the city of Boston to be appointed by the Governor of the Commonwealth. Section 2 of this act conferred upon the board of police "all the powers now vested in the board of police commissioners in said city of Boston by the statutes of the Commonwealth or by the ordinances, by-laws, rules and regulations of said city," with exceptions not here material. See St. 1906, c. 291, §§ 4 and 10. These provisions of the statutes and ordinances were in force during the period covered by the complaint. It is clear that, if the defendant was either a hawker or a pedler or operating a carriage, wagon or other vehicle, he could justify his actions only by showing a license from the board of police of Boston. This he did not have and his justification fails.

But the ruling of the court below was correct upon broader grounds. The device which the defendant maintained, although mounted upon wheels, was in fact a small room used for an eating house and kept constantly at one place in the street for over ten consecutive hours. During this time no horse was attached and no use was at any time made of the wheels except to drag the cart to and from its place in the public way. The public secure by the location of a highway an easement of passage, with all the powers and privileges which are necessarily implied as incidental to its exercise. The easement is coextensive with the limits of the highway. The fee of the land remains in the landowner, who may make any use of it not inconsistent with the paramount right of the public. *Como* v. *Worcester*, 177 Mass. 543. The easement acquired by the public includes every reasonable means of transportation for persons and commodities, and of transmission of intelligence, which the advance of civilization may render suitable for a highway. Under this description, gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads have been permitted within the limits of highways. *Pierce* v. *Drew*, 136 Mass. 75. *Howe* v. *West End Street Railway*, 167 Mass. 46. *Allen* v. *Boston*, 159 Mass. 324. *White* v. *Blanchard Bros. Granite Co.* 178 Mass. 363. *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.* 182 Mass. 397. *Boston Electric Light Co.* v. *Boston Terminal Co.* 184 Mass. 566. *Lorain Steel Co.* v.

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Norfolk & Bristol Street Railway, 187 Mass. 500. *Eustis* v. *Milton Street Railway*, 183 Mass. 586. *McDermott* v. *Warren, Brookfield & Spencer Street Railway*, 172 Mass. 197. *Sears* v. *Crocker*, 184 Mass. 586. *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246. *Williams* v. *Old Colony Street Railway*, 193 Mass. 305. *Hyde* v. *Boston & Worcester Street Railway*, 194 Mass. 80. But, notwithstanding these various instrumentalities, they are all manifestations in divers forms of the right of travel of persons, the transmission of intelligence and the transportation of commodities. The primary purpose of a highway is the passing and repassing of the public, which is entitled, so far as needed, to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. Whenever the public does not have occasion to exercise its easement to its full extent, the owner of the fee may make any use not inconsistent therewith. Whatever interferes with the exercise of this easement is a nuisance. *Commonwealth* v. *King*, 13 Met. 115, 118. *Commonwealth* v. *Wilkinson*, 16 Pick. 175. *Gifford* v. *Westport*, 190 Mass. 323. *Tinker* v. *New York, Ontario & Western Railroad*, 157 N. Y. 312. The stands of hackney carriages may perhaps be justified as a phase of public travel, (*Commonwealth* v. *Matthews*, 122 Mass. 60,) and the use of streets in connection with markets, in view of long continued customs in Boston and perhaps elsewhere in this Commonwealth, as incidental to the transportation of merchandise, *Commonwealth* v. *Brooks*, 109 Mass. 355, and possibly also in connection with the establishment of a public market, *Spaulding* v. *Lowell*, 23 Pick. 71, *Kinney* v. *Robison*, 49 Mich. 247. Whether carriage and truck wagon stands can be authorized against the protest of an abutting owner may be open to doubt. See *Branahan* v. *Hotel Co.* 39 Ohio St. 333; *Lippincott* v. *Lasher*, 17 Stew. (N. J.) 120; *McCaffrey* v. *Smith*, 41 Hun, 117. Hawking and peddling is also an illustration of a legitimate use of the highway. It consists of transportation of merchandise, and the stops for sale are brief and ordinarily not of such character as to constitute any substantial obstruction to the rights of travellers. The business of the defendant does not come within any description of travel, nor does it have a necessary or reasonably natural connection with the passing of persons or the transportation of commodi-

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ties. The establishment in highways of drinking fountains, R. L. c. 25, § 15, *Cushing* v. *Bedford*, 125 Mass. 526, erection of guide boards, R. L. c. 52, §§ 1, 2, 3, St. 1906, c. 234, *Sharon* v. *Smith*, 180 Mass. 539, and planting and protection of shade trees, R. L. c. 25, § 15, *Washburn* v. *Easton*, 172 Mass. 525, *Hall* v. *Wakefield*, 184 Mass. 147, have all been expressly authorized by statute, and bear an obvious relation to the convenience, comfort and pleasure of travel. The obstruction they offer to the use of the entire way for passage is ordinarily trifling, and they have been regarded as legally incidental to the general purpose for which the public easement of travel has been taken from the private owner by eminent domain. But eating, although necessary for human beings, is no more essential to their welfare than sleeping or clothing or cleanliness, nor does it bear any closer relation to travel upon highways than any of these other human functions. It could not be contended that the establishment on wheels of lodging houses, provision or furnishing stores, or bath rooms, to be drawn and left for considerable periods of time at fixed places in the highway, was fairly comprehended within the description of travel upon the highway. *Haberlil* v. *Boston*, 190 Mass. 358. It may well be that the present instrumentalities or methods of travel do not necessarily exhaust the range of uses to which highways may be put, but the acts of the defendant do not belong to the class of purposes for which ways have been established. Moreover, the defendant is appropriating, for purely personal profit, a substantial portion of what has been procured from private owners at the public expense for a wholly public use. He is plying his vocation at a particular place within the limits of the highway for several hours at a time, night after night. In a limited way he is doing the same sort of service as innkeepers and common victuallers. Therefore, no municipal ordinance can afford him a shield of protection against prosecution for an obstruction to travel upon a public way. *Cohen* v. *Mayor of New York*, 113 N. Y. 532. *Commonwealth* v. *Millinian*, 13 Serg. & R. 403. *Blodgett* v. *Boston*, 8 Allen, 237. *Commonwealth* v. *Wentworth*, 4 Clark, (Pa.) 324. See *Keith* v. *Easton*, 2 Allen, 552.

Verdict to stand.

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UNITED SHOE MACHINERY COMPANY *vs.* BRESNAHAN SHOE MACHINERY COMPANY.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* MAURICE V. BRESNAHAN.

Essex. November 6, 1907. — January 22, 1908.

Present: KNOWLTON, C. J., LORING, BRALEY, & RUGG, JJ.

Evidence, Likely to distract attention of jury, Relevancy and materiality, Presumptions and burden of proof, Of ownership. *Agency*, Scope of authority. *Practice, Civil*, Conduct of trial, Exceptions. *Replevin*. *Estoppel*.

At the trial of an action of replevin for certain machines, it appeared that the machines were protected by letters patent, that they had been in the possession of one to whom the plaintiff had conveyed them under leases which recited that they were patented, and one of the terms of which was that the lessee should not transfer possession of the machines without the consent of the plaintiff. There had been a fire in the factory of the lessee and the machines had been damaged. The defendant contended and introduced evidence tending to show that there had been negotiations between the plaintiff and the lessee authorizing the lessee to sell the machines as junk, and that under that authority they had been sold to one who sold them to the defendant. The plaintiff introduced evidence tending to contradict that of the defendant, and offered the letters patent, thirty-eight in number, as evidence affecting the probability of his consenting to have the machines sold as junk. Both parties throughout the trial assumed that the machines were patented and referred to the fact in their arguments. The letters patent were long, complicated and elaborate, included drawings and specifications, and were full of technical terms, and the presiding judge excluded them on the ground that they might mislead the jury more than they would aid them. *Held*, that, even if the evidence offered was competent, the plaintiff was not harmed by its exclusion, and that the ruling of the judge was warranted for the reason which he gave.

At the trial of an action of replevin for certain machines, a question at issue was whether the plaintiff had given to one to whom he had leased the machines authority, after a fire in the lessee's factory in which the machines were damaged, to sell them as junk, and there was evidence, introduced by the defendant but controverted by the plaintiff, tending to show that the lessee had a conversation with one W., in which he was told that, if one S., after examination of the machines on behalf of the plaintiff, told the lessee that they were worthless, the lessee might sell them as junk. The plaintiff was a corporation and W. was its assistant general manager. There was evidence that his "duties were not prescribed," but were "looking after the general management of the business," and there was testimony of W. and admissions of the plaintiff tending to show that he had authority from the plaintiff to do whatever he did in the transaction with the lessee. The defendant, after introducing evidence of S.'s

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examining the machines, was then allowed, subject to exception by the plaintiff, to show that S. said to the lessee that he did not think that the machines were of any value, the presiding judge admitting the testimony "only so far as it was within the scope of the authority given by W." *Held*, that there was evidence that W. had authority to delegate authority to S., that he had done so, and that S. had acted within the authority thus delegated to him; and, therefore, that the evidence objected to was admissible.

Where a plaintiff excepted to the admission of evidence at a trial, and, in his ruling admitting it, the presiding judge stated that it was a part of the history of the transaction between the parties and might be dealt with later in the trial by striking it out or by giving instructions with regard to it, and later in the trial a witness for the plaintiff in direct examination gave evidence of the same kind and was cross-examined fully upon the subject, and no motion was made by the plaintiff to strike out the evidence or for instructions regarding it, the exception was overruled.

Rulings requested at the trial of a case which were inapplicable because the charge to the jury removed from their consideration the subject to which the rulings referred were *held* rightly to have been refused.

At the trial of an action of replevin for certain machines, it appeared that the plaintiff formerly had owned the machines and had leased them to one for use in his factory, and that the factory had burned and the machines been damaged. There was evidence tending to show that one having authority to act for the plaintiff had told the lessee that, if a certain person should say that the machines were worthless, the lessee might sell them as junk, that the person designated did say that the machines were worthless, and that the lessee sold them as junk to one from whom the defendant purchased them in good faith. *Held*, that there was evidence to warrant a submission of the case to the jury and to warrant them in finding for the defendant.

If one stands by and, without disclosing his ownership, allows his property to be sold to an innocent purchaser for value, he is estopped from claiming it afterwards.

Where, at the trial of an action of replevin, the plaintiff introduces evidence from which the jury might draw inferences which would warrant them in finding for the plaintiff, but which, without such inferences, would not warrant a finding for the plaintiff, and the defendant introduces no evidence, the presiding judge rightly may refuse to rule that, as a matter of law, the plaintiff is entitled to the property replevied.

At the trial of an action of replevin, the plaintiff introduced evidence from which the jury might draw inferences which would warrant a verdict for the plaintiff. The defendant introduced no evidence. The presiding judge instructed the jury: "The possession of the property by the defendant and exercising rights of ownership over it is evidence of ownership to consider." *Held*, that the instruction was correct.

FOUR ACTIONS OF REPLEVIN. Writs in the Superior Court for the county of Essex dated respectively January 2, 1904, December 30, 1903, January 1, 1904 and January 1, 1904.

The four actions were tried together before *White*, J. The property described in the writs in the first three actions and taken by the officer thereunder were various pieces of machin-

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ery which once was in the possession of and owned by the plaintiff and which it had delivered under leases to two firms named F. W. Lord and Company and Bowers and Shaw, and to the latter's predecessor. The leases were in evidence, and, besides the terms described in the opinion, contained stipulations to the effect that neither they nor any of the rights of the lessees thereunder were assignable except by consent in writing of the plaintiff, and that the machinery was to be "used only by the lessee himself or by operatives in his direct employ and only in the factory" then "occupied by him."

Some of these leases contained the following clause: "The lessee shall at his own expense insure against loss by fire and keep insured to the full value thereof the said machinery, and in case of loss shall pay forthwith to the lessor a sum equal to the full amount of the loss occasioned to the lessor." From other leases this clause was omitted because, so far as they were concerned, the plaintiff had received full protection against fire through a deposit (called a "lease premium" or "initial license premium") made at the outset by the lessee and representing the full value of the machines. Whenever this initial premium was not taken, the insurance clause was inserted in the lease.

The factories containing the machinery were burned. Thereafter there were interviews or an interview between members of the firms of F. W. Lord and Company and of Bowers and Shaw and one Willson, assistant general manager of the plaintiff, with regard to the disposition of the machinery. The evidence as to what was said at such interview or interviews was conflicting, but the evidence introduced by the defendant tended to show that there were several interviews, that, at the first, Willson had said that, if the machinery was not good for anything, the plaintiff did not want it, and that he would send a man to examine it; that later a man went from the plaintiff to examine the machinery; that, in the meantime, bills for the insurance value of such of the machinery as was not insured had been sent to the two firms; that one of the firm of F. W. Lord and Company again interviewed Willson and paid the bill which had been rendered to his firm, and Willson at that time stated, upon Lord's inquiring "what he should do with the remains" that he was not quite satisfied as to the report of the inspector, but that

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"he would send Mr. Sanborn, their expert, there, and that, if Sanborn pronounced the machines worthless," Lord "should sell them as junk." Willson testified that "when it was proved as junk, it might be disposed of by Mr. Lord and Mr. Bowers." Besides the testimony as to the authority of Willson which is stated in the opinion, Willson himself testified that he did not think he did anything in the matter of the machines in question that he did not have authority to do.

Lord further testified that, after the talk with Willson in which he said he would send Sanborn to look at the machines, Sanborn did so. Subject to exception by the plaintiff, he then stated that Sanborn told him and Bowers that the machinery in its then state was worthless.

Thereafter F. W. Lord and Company and Bowers and Shaw sold the machines as junk. It was with regard to that sale that the presiding judge propounded to the jury the question, "Did Charles H. Willson give to F. W. Ford and Company and Bowers and Shaw an unrestricted right to sell the materials which had passed through the fire?" They answered "Yes."

The fire at the factories occurred on February 6, 1903. The testimony of Lord was that the first visit to the factories by a representative of the plaintiff was within a week of the fire, and that the visit of Sanborn was seven or eight days after that. The bills for "insurance valuation," hereinbefore referred to, were rendered by the plaintiff on February 11.

The lessees sold the machines as junk to one Rowan, who moved it away between February 20 and March 5, Rowan's best recollection of the date being that it was about February 28. Rowan sold to the defendant, who repaired the machinery, purchasing new parts therefor from the plaintiff.

There also was in evidence correspondence between the Boston office of the plaintiff, and the Lynn office, from which it appeared that, in answer to an inquiry by the Lynn office on February 10, "What is the custom in reference to a fire of this kind, are we to go to this factory and see that the machines are junked or returned, after the insurance companies have made proper adjustment?", the Boston office replied on February 11, "We are in receipt of your favor of the 10th inst, advising us that the machines leased to Bowers & Shaw and F. W. Lord

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were totally destroyed by the recent fire. Our usual policy in cases of this kind is to render bill for insurance value on the machines and await the adjustment of the loss by the insurance inspectors, when we will ask you to see that the machines are junked (that is, if they are beyond repair,) and report to us"; and that there was no further correspondence until after representatives of the Lynn office had gone to the factories on March 4 and found the machines gone. Willson testified that, after the plaintiff knew that Bowers and Shaw had sold the machines, namely, on March 9, it received from them payment of the bill for insurance value which it had rendered to them. The bill submitted to F. W. Lord and Company was paid by them on February 19.

During the course of the trial, a tabulated list was prepared of the articles included in the officer's returns, and was introduced as an exhibit. The plaintiff's counsel objected to the admission in evidence of the last column of this list which was headed "Lease Premium." The defendant's counsel thereupon stated that he proposed to show that the lease premiums represented sums paid to the plaintiff or its predecessors, which in each instance represented the full value of the machines; that this payment was in accordance with the practice of the plaintiff, and took the place of insurance as to these articles, and that the evidence was offered as part of the history of the machines. The ruling of the presiding judge and the further course of the trial with regard to this evidence are stated in the third paragraph of the opinion. The provisions in the leases with regard to insurance are hereinbefore set forth.

The evidence as to the last case was that predecessors of the plaintiff had leased to certain parties by numbers machines called a grip slugger and corrugated tackers in 1892 and 1893, one condition of the leases being that the lessee should not transfer the property or assign his rights under the lease except by consent in writing of the lessor, but there was no further evidence of the history of the machines covered by the leases except that certain machines bearing the same numbers and having the same general description were taken from the defendant's possession by the officer acting under the replevin writ. The defendant introduced no evidence.

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At the close of the evidence, the plaintiff requested the presiding judge to rule, in the first three cases, as follows:

1. On all the evidence the plaintiff is entitled to a verdict in this action.

2. On all the evidence the plaintiff is entitled to a verdict in this action as to any and all of the machines seized therein for which the plaintiff has not received the insurance.

3. If the plaintiff had title to the machines seized in this action at the time of the fire, it does not appear in evidence that anything has occurred to defeat that title, and the plaintiff is entitled to recover.

4. If the plaintiff had title to the machines seized in this action at the time of the fire, it does not appear in evidence that anything has occurred to defeat the title to any of such machines for which the plaintiff has not received the amount of the insurance, and as to such of said machines in any event the plaintiff is entitled to a verdict.

5 If the insurance money was accepted solely because of a mistaken belief that the machines covered by the insurance had been totally destroyed, but in fact they had not been, such acceptance would not destroy such title as the plaintiff had to the machines so insured, in favor of the defendant.

6. If the amount of the insurance was accepted by the plaintiff solely because of a mistaken belief that the machines insured had been totally destroyed, but in fact they had not been, and this belief was caused by the statement of the lessee or lessees that such machines had been totally destroyed, then the acceptance of the amount of the insurance would not have the effect of destroying such title as the plaintiff then had in favor of the lessee or lessees, or in favor of the defendant.

7. The evidence does not warrant the finding that the plaintiff has abandoned any of the machines seized in this action.

8. The evidence does not warrant the finding that the plaintiff has abandoned any of the machines seized in this action for which the plaintiff has not received the amount of the insurance.

9. The evidence does not warrant the finding that the plaintiff is estopped to claim such rights as it had to any of the articles seized in this action.

The requests were refused, the presiding judge stating that

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requests numbered five and six were refused as inapplicable on the ground that the receipt of the insurance money would in no event pass title to the property by operation of law; and the plaintiff excepted.

In the last case, the plaintiff requested the presiding judge to rule (1) that on all the evidence the plaintiff was entitled to the grip slugger and corrugated tackers, and (2) that the evidence, if believed, entitled the plaintiff to them. These requests also were refused, and the plaintiff excepted.

The following portion of the charge of the presiding judge with regard to the first three cases was excepted to by the plaintiff:

"Now, there is evidence here that Lord told Willson that he was going to rebuild, and that this stuff must be out of the way, and that he wanted to get it out of the way and he wanted Willson's opinion as to whether it was worth more for junk or whether it was worth more to make into serviceable machinery. Now, if the plaintiff knew that this property was going to be sold and wanted to exercise any further rights of ownership upon it, knowing that rights of other parties might intervene, it was its duty to act within a reasonable time, and it is for you to say whether it took any action within a reasonable time or whether Lord and the other firm acted in unreasonable haste in getting rid of the property and deprived the plaintiff of the opportunity of reducing it to junk, because if it knows its property is to be sold it should exercise such rights as it cares to exercise in seeing that the property is reduced to junk within a reasonable time."

The plaintiff also excepted to the first four lines of the following portion of the charge with regard to the last case:

"The possession is some evidence of title, some evidence of ownership. That is, it was found in the possession of the defendant, and possession of property and exercising rights of ownership over it is evidence of ownership for a jury to consider. The other evidence is for you to consider, — that is, the serial numbers and the fact of an ancient lease covering these. The burden is upon the plaintiff. If you should say that the plaintiff has sustained the burden, upon an item, then it is to have a verdict upon that item. If you should find that it has failed

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to sustain that burden, then the defendant is entitled to a verdict."

Verdicts were returned for the defendant in each case.

E. F. McClennen, (*A. L. Fish* with him,) for the plaintiff.

E. R. Thayer, (*W. B. Murphy* with him,) for the defendant.

KNOWLTON, C. J. The plaintiff's first exception was to the exclusion of the patents. These were thirty-eight in number, each of which included drawings and specifications, some of which were long, complicated and elaborate. The only ground upon which it can be contended that they were competent is that they affected the probability of the respective contentions of the parties as to the arrangements made between them. It is argued that the plaintiff would be less likely to agree to an abandonment of patented machines, even if they were supposed to be ruined by fire, than to the abandonment of machines that were not patented. The fact is undisputed that the machines were treated by the plaintiff as useless after the fire, and that they were paid for to the plaintiff by the insurance company as for a total loss. If we assume that the evidence was competent, there is nothing to show that the plaintiff was harmed by the exclusion of it. The leases on which the title of each party was founded were in evidence, and they recited that these articles were patented, and they contained elaborate provisions to protect the rights of the owners of the patents. Both parties assumed that the machines were patented throughout the trial, and referred to that fact in argument. There is nothing to show that the details of the patents would have strengthened the plaintiff's contention in this particular. The judge excluded them as a matter of discretion, on the ground that they might mislead the jury more than they would aid them. We are of opinion that he was right in his view of the effect that the reading of these long documents, full of technical terms, would be likely to have upon the trial, and, in the absence of anything to show that their details would have added anything material to the facts before the court, the exception must be overruled.

The statement of Sanborn to Lord, after looking over the property which had been through the fire, that he did not think it of any value, was admitted only so far as it was within the scope of the authority given by Willson, and not on any inde-

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pendent ground. There was evidence of a conversation with Willson, the assistant general manager of the corporation, which would justify the admission of Sanborn's statement if Willson had authority to deal with these damaged machines by taking their full value as for a total loss and allowing the lessee to sell the material as junk. We are of opinion that there was evidence as to the nature of his duties, the method in which business of this kind was done by the plaintiff, and as to the subsequent conduct of the plaintiff in regard to the property, which well warranted a finding that he was authorized to do what the defendants contended that he did. He testified as to his duties, "Well, the duties are not prescribed; it is looking after the general management of the business." When the defendants asked him in cross-examination what was his salary, as bearing upon the importance of his position and the extent of his authority in the company, the plaintiff's counsel objected, and added, "I do not deny his authority. I said a moment ago that I conceded that he had authority to do everything that he said he did." We are of opinion that the testimony was competent.

The evidence in the schedule prepared by the parties, showing that lease premiums were paid to the plaintiffs to the full value of the machines in those cases in which the interest of the plaintiff was not covered by insurance, was admitted, in the first instance, as a part of the history of the machines in the arrangement of the parties, with a suggestion by the judge that it might be dealt with later by striking it out or giving instructions in regard to it. Afterwards the plaintiff, through the witness Willson, introduced evidence of the same kind, namely, that the "bills for insurance are confined to the machines that are put out without the initial license premium." The witness was cross-examined fully upon the subject. No request was made to have the evidence stricken out or any instruction given in regard to it. This evidence showed that the position of the plaintiff was substantially the same in the leases which contained the insurance clause as in those which did not, and it was properly admitted in explanation of the dealings of the parties in reference to the property.

The plaintiff's fifth and sixth requests for instructions were rightly refused on the ground that they were inapplicable to the

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case as it was to be submitted to the jury. Upon the instruction given, the jury were not permitted to find for the defendant on the ground that the acceptance of the insurance money would deprive the plaintiff of its title.

The plaintiff's first, second, third and fourth requests for instructions were rightly refused. The jury's answer "Yes," to the question, "Did Charles H. Willson give to F. W. Lord and Company and Bowers and Shaw an unrestricted right to sell the materials which had passed through the fire?", which was well warranted by the testimony, taken in connection with the evidence of authority in Willson to give such a right, shows that neither of these requests could properly have been given.

The instruction that "if the plaintiff knew that this property was going to be sold and he wanted to exercise any further rights of ownership upon it, knowing that rights of other parties might intervene, it was his duty to do it within a reasonable time, and it is for you to say whether he took any action within a reasonable time," was correct. This was simply an application of the principles which lie at the foundation of the law of estoppel. It is a familiar rule that, if one stands by and allows his property to be sold to an innocent purchaser without disclosing his ownership, he is estopped from claiming it afterwards. The hypothetical case stated in the instruction was within the reason of this rule.

In the fourth case the judge rightly refused to instruct the jury that, if they believed the evidence, the plaintiff was entitled to the grip slugger and was also entitled to the corrugated tackers. The submission of the case to the jury upon the evidence was a ruling that the evidence would warrant a finding for the plaintiff. We understand that the request was for a ruling, in substance, that the plaintiff was entitled to the property as matter of law, if the evidence was true. With inferences of fact that might be drawn from the evidence, the plaintiff's case would have been made out; but the jury might or might not draw these inferences. Without them the case was not proved.

The instruction in regard to possession was correct. It is a familiar rule that possession of property, with the exercise of

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rights of ownership over it, is some evidence of title. Ordinarily it makes a *prima facie* case for the proof of title by the possessor. If testimony is introduced to control it, the whole evidence is considered together to determine the true title, and possession, with the exercise of the usual rights of an owner, is not disregarded. In each of the cases the entry must be,

Exceptions overruled.

DENNIS W. QUILL *vs.* BOSTON INSURANCE COMPANY.

Essex. November 6, 1907. — January 22, 1908.

Present: KNOWLTON, C. J., LORING, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Decree. *Agency*, Existence of relation. *Contract*, What constitutes. *Equity Jurisdiction*, Specific performance. *Insurance.*

On an appeal from a decree in equity where all the evidence is reported and it appears that the decree is based upon findings of fact made by the judge presiding at a hearing where there was oral testimony, the findings will not be reversed unless plainly wrong.

At the hearing in a suit in equity against an insurance company to compel it to deliver to the plaintiff a policy of insurance and to pay for the loss of the property alleged to have been insured, it appeared that an insurance agent sought to procure from the defendant insurance upon the property of the plaintiff, but that the defendant in a letter to the agent stated that it could not insure the property until bills showing certain expenditures on and the purchase price of the property were submitted to it, and there was evidence that the letter containing such statement was shown to the plaintiff. The bills requested were never submitted to the defendant. There also was evidence that the agent at one time had been an agent of the defendant, but not as to the kind of insurance that the plaintiff was seeking. The property was lost after the time when, according to the contention of the plaintiff, the insurance was effected. The presiding judge found that the agent was not an agent of the defendant to effect the kind of insurance the plaintiff sought, and, on other evidence, found that the agent thought "that an order for such insurance sent by him to the defendant would be honored and the risk accepted by the defendant," and that the plaintiff thought that the insurance had been effected; and the judge ordered the bill dismissed. *Held*, that the decree should be affirmed, since the evidence warranted the findings and at most disclosed negotiations which had not reached the contractual stage.

BILL IN EQUITY by amendment from an action at law allowed in the Superior Court for the county of Essex June 6, 1906.

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There was a hearing before *Aiken*, C. J., who directed a decree dismissing the bill, and the plaintiff appealed. All the evidence was taken by a commissioner and appeared in the record. The facts appear in the opinion.

D. W. Quill, pro se.

E. E. Blodgett, for the defendant.

RUGG, J. This is a suit in equity by which the plaintiff as receiver of the Beverly Transportation Company seeks to compel the defendant to deliver to him a policy of marine insurance on the steamer Monohansett and pay for her loss under such policy. There was a hearing before the chief justice of the Superior Court, who found as facts that the agent of the Transportation Company believed that he had effected insurance upon the steamer, to go into effect at twelve o'clock, August 3, 1904; that one Norton, an insurance agent, thought that an order for such insurance sent by him to the defendant would be honored and the risk accepted by it; that Norton was not an agent of the defendant to effect marine insurance; and that there was no acceptance of the risk by the defendant. A final decree was entered dismissing the bill, and the plaintiff appealed.

The witnesses were heard orally, and the findings of the court based upon such evidence will not be reversed unless plainly wrong. *Jennings* v. *Demmon*, 194 Mass. 108. The findings were fully warranted. Norton testified that at one time he represented the defendant for a term of three years for fire business, but it did not appear precisely when this agency began or ended, and that he never had any agency from it for marine business. This testimony was not contradicted. His acts respecting this particular matter do not show that he was attempting to act as agent for the insurance company. His first communication touching the subject was a letter containing the statement that his firm had the insurance to place upon the Monohansett and a request to the defendant to write it. The reply of the defendant was a declination, unless substantial repairs were made. Correspondence ensued, in which the amount expended for purchase and repairs and the rate of insurance and payment were discussed, but Norton does not assert any power as agent. He is rather asking as a customer for the issuance of

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a policy. There was no evidence that at the time in question the defendant held out Norton as its agent generally or as to marine insurance. In its letter of August 3d the defendant repeated in substance what it had said before: "I shall have to ask before writing the insurance that the bills you have and an account of the bills that are incurred be submitted together with the bills showing the purchase price of the steamer. I regret that I positively cannot write the insurance until this is done." This condition never was complied with, and only a promise of performance accompanied the final request. Over sanguine hopefulness alone could infer from this language that a policy of insurance would be issued upon the sole promise that bills would be furnished in the future. There was also evidence tending to show that the contents of the defendant's letters were imparted to the representative of the Transportation Company. The steamer was lost on the afternoon of August 3. Upon being notified of the loss the defendant disclaimed liability. All the circumstances disclose negotiations respecting insurance, which had not reached the contractual stage.

Decree affirmed.

JOHN J. ROUND *vs.* POLICE COMMISSIONER FOR THE CITY OF BOSTON.

Suffolk. November 19, 1907. — January 22, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pawnbroker. Public Record. Words, "Received for filing."

The record of the transactions of a pawnbroker required by R. L. c. 102, § 42, as amended by St. 1907, c. 211, to be furnished once a week to the licensing board or to any person designated by that board, is not a public record to which all persons may have access and of which they are entitled to be furnished with copies under R. L. c. 35, § 17.

A return made by a pawnbroker to a licensing board under R. L. c. 102, § 42, as amended by St. 1907, c. 211, is not within the definition of a public record in R. L. c. 35, § 5, which includes, among other things, any paper which any officer or employee of the Commonwealth or of a county, city or town has received or is required to "receive for filing."

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PETITION, filed August 13, 1907, for a writ of mandamus directed to the police commissioner for the city of Boston, ordering him to allow the petitioner to inspect the records filed with the commissioner by pawnbrokers as required by the provisions of St. 1907, c. 211.

The answer of the respondent alleged, among other things, that the records sent to him pursuant to St. 1907, c. 211, are not public records, but are confidential records kept for the convenience of the respondent and for the purpose of assisting the police department for the city of Boston in the conduct of its affairs, and in detecting crime and apprehending offenders where crime has been committed, and are not such records as are open to the inspection of the public.

The case was heard by *Hammond*, J., upon the allegations of the petition and of the answer, and no testimony was offered by either party. The respondent waived any and all objections to the form of the proceeding and to the right of the petitioner to bring the petition. The justice ruled that the reports or records described in the petition, furnished to the respondent according to the provisions of St. 1907, c. 211, were not public records, and that upon the allegations of the petition the petitioner was not entitled, as a matter of law, to inspect the records. The justice ordered that the petition be dismissed; and the petitioner alleged exceptions.

G. M. Poland, for the petitioner.

L. A. Rogers, for the respondent, submitted a brief.

KNOWLTON, C. J. The only question presented by this case is whether the record of the transactions of a pawnbroker, required to be furnished to the licensing board once a week under the R. L. c. 102, § 42, as amended by the St. 1907, § 211, is a public record, to which all persons may have access, and of which they are entitled to be furnished with copies under the R. L. c. 35, § 17.

Before the enactment of the amendments just referred to, the R. L. c. 102, § 42, was as follows: "Every such pawnbroker shall keep a book in which, at the time of making such loan, shall be legibly written in the English language, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging them,

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the rate of interest to be paid on such loan, and the name and residence of the person pawning or pledging such goods, articles or things." Section 44 provides that, "said book shall, at all reasonable times, be open to the inspection of the mayor, of the members of the board of police, of the superintendent of police and deputy superintendents, of the chief inspector of police, of any member of the district police or of any person authorized by them in writing for that purpose who exhibits such written authority to such pawnbroker."

Section 44 remains unchanged, and its provisions show that the principal purpose of the book is to assist officers of the law in the detection of crime, and that it is not for use by the general public. Every person who pledges his property is protected by the stringent requirements of §§ 43 and 45 that the pawnbroker shall give him a memorandum or note, signed by the pawnbroker, containing a statement of the particulars of their transaction. Without some good reason, we should not expect that all transactions between borrowers and pawnbrokers should be opened to the reading of the whole community by being made a part of the public records. We think it plain that the record to be furnished under the St. 1907, c. 211, is for the information and use of the licensing board, and not to be placed on file for the information of the public. Most of these boards are the same that appoint and control the police department, and one object of the requirement doubtless is to have a record of the doings of all pawnbrokers more readily accessible to the police departments than by a visit to the books in the hands of the pawnbrokers. Another object of the statute is to have before these licensing boards information that may be used in passing upon applications for renewal of licenses.

The petitioner contends that such a paper, returned to the licensing board, is a public record under the R. L. c. 35, § 5, because it is a paper which an officer of the city has received or is required to receive for filing. An examination of this section shows that it relates to books, papers and maps which are intended for the use of the public. We are of opinion that the returns by pawnbrokers are not papers received for filing. There are statutes which require that certain papers be filed in the office of the city or town clerk, or in some registry, for inspection by

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all persons interested. Such papers are "received for filing," within the meaning of the statute; but the statute as to returns by pawnbrokers makes no provision for filing. The licensing boards may preserve them in such a way as they choose.

Exceptions overruled.

AMERICAN BAPTIST PUBLICATION SOCIETY & others *vs.* LUCY A. LUFKIN & others.

Essex. November 6, 1907. — January 25, 1908.

Present: KNOWLTON, C. J., LORING, BRALEY, & RUGG, JJ.

Devise and Legacy. Power.

A testator devised and bequeathed to his wife "all the rest and residue of my estate both real and personal that I may have at the time of my decease to use and dispose of as she may think best for her interest and comfort. And at her decease my will is that what may remain (if any) of my estate thus given to my said wife shall be equally divided between" four charitable corporations named. *Held*, that, as to the real estate, the widow took an estate for life with an unlimited power of disposal in fee, if in her judgment such disposition became necessary "for her interest and comfort," and that the charitable corporations took estates in remainder subject to be divested by an exercise of that power, which, on the death of the widow without having exercised the power, became absolute.

Where a testator leaves to his wife all his real estate for life with an unlimited power of disposal in fee, if in her judgment such disposition becomes necessary "for her interest and comfort," the power is broad enough to permit its exercise by her will, if she finds this to be necessary for her welfare and comfort, but an ordinary residuary clause in her will, where neither the language of the will nor any extrinsic facts indicate an intention to exercise the power, is not sufficient for the purpose.

PETITION, filed in the Land Court on May 29, 1906, by four charitable corporations, for the registration of title to certain parcels of land in Manchester claimed by the petitioners under the will of Samuel Cheever, late of Manchester, the interest of Susan Hannah Cheever, widow of Samuel Cheever, in the land being alleged to have terminated upon her death on March 19, 1905.

In the Land Court the case was tried before *Davis*, J. The material portion of the will of Samuel Cheever is quoted in full in the opinion. It was dated January 30, 1865. The testator

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then was fifty years of age. He died on July 9, 1892, at the age of seventy-eight years, leaving Susan Hannah Cheever as his widow and no children. The inventory of his estate showed real estate, consisting principally of the lands in question, to the value of $9,007.90 and personal property to the value of $2,333. Susan Hannah Cheever died on March 19, 1905, leaving a will which was dated June 9, 1894. After disposing of certain personal effects, the only devises and legacies in her will were as follows:

"The remainder of my estate, both real and personal after payment of my debts and expenses of settling my estate, I desire to devise and bequeath as follows: The income thereof I give to my brother Daniel W. Friend as long as he lives, and if in his judgment the income is insufficient to supply his needs then he can appropriate to his own use the whole or any part of my real and personal estate thus given as he deems proper and best, authority being hereby given him to sell and convey in his own name my real estate; and if any part of my real or personal estate remains at the decease of my said brother Daniel W. Friend I give and devise the same to my nieces and nephew above-named (Lucy Ann Lufkin, Alinda F. Currier and Charles A. Staten) and their heirs and assigns forever equally."

Daniel W. Friend died on March 24, 1904, before his sister Susan H. Cheever, and the respondents named in the petition were the nephew and nieces named in the residuary clause of the will of Susan H. Cheever.

On the foregoing facts the respondents asked the judge to rule, as matter of law, as follows:

"1. That by the will of Samuel Cheever, late of Manchester, deceased, under which the several parties to this action claim title, no estate whatever was devised to the Baptist societies named therein, or either of them.

"2. That by the will of Samuel Cheever, late of Manchester, deceased, under which the several parties to this action claim title, no estate whatever was devised to the petitioners."

The judge refused to rule as requested, and instead thereof ruled, as matter of law, as follows:

"1. That under the second clause in the will of the said Samuel Cheever, his widow, Susan H. Cheever, took a life

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estate, coupled with a power of disposal of the entire estate of the testator in fee as she might think best for her interest and comfort, with remainder as to such of the testator's estate as should not be so disposed of by said Hannah, to the Baptist societies therein designated.

"2. That said power of disposal was not exercised by Mrs. Cheever under and by virtue of her will.

"3. That title to the premises in question, subject to any existing rights of way therein, is in the petitioners in fee, under the will of said Samuel Cheever."

In accordance with these rulings the judge filed a decision ordering a decree for the petitioners, subject to any existing rights of way.

To the refusals to rule and to the rulings made the respondents excepted, and, at the request of both parties, the judge reported the case for determination by this court. If the rulings were right, a final decree is to be entered for the petitioners as ordered; if either of the rulings was wrong, a final decree was to be entered of "Petition dismissed."

S. Perley, for the respondents.

D. P. Bailey, for the petitioners.

BRALEY, J. After giving by the first clause a small pecuniary legacy, which subsequently lapsed by the death of the legatee before the testator, in the second clause of his will Samuel Cheever devised and bequeathed to his wife, "all the rest and residue of my estate both real and personal that I may have at the time of my decease to use and dispose of as she may think best for her interest and comfort. And at her decease my will is that what may remain (if any) of my estate thus given to my said wife, shall be equally divided between the Massachusetts Baptist Bible Society — The Massachusetts Baptist Home Missionary Society, the Massachusetts Baptist Foreign Missionary Society, and the Massachusetts Baptist State Convention to assist destitute churches." By this language she took an estate for life, with an unlimited power of disposal in fee, if in her judgment such disposition became necessary "for her interest and comfort." But until her death it could not be ascertained whether the remainder which vested in the societies named, to whose estate the petitioners have succeeded, would be divested

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by an exercise of the power. *Chace* v. *Ladd*, 153 Mass. 126. *Dana* v. *Dana*, 185 Mass. 156. *Ball* v. *Holland*, 189 Mass. 369. *Raymond* v. *Commonwealth*, 192 Mass. 486. The report is somewhat barren in details, but it is to be inferred that the real property was not alienated, unless by her will she devised the fee. While the power is sufficiently broad to permit this, if her welfare or comfortable support required it, the sole fact that she died testate is not sufficient. It does not appear either from the language of her will, or from any extrinsic facts, that in any of its provisions the instrument was intended to operate as a legitimate execution of the power. *Raymond* v. *Commonwealth*, *ubi supra*. *Stone* v. *Forbes*, 189 Mass. 163. The will consequently devised only such property as the testatrix held in her own right, and at her death the petitioners, whose title had not been divested, were entitled to possession. The rulings requested by the respondents, therefore, were rightly refused, and those given correctly stated the law.

By the terms of the report a final decree is to be entered in favor of the petitioners, the terms of which are to be settled in the Land Court.

So ordered.

MARY RICHSTEIN *vs.* JAMES WELCH.

Essex. November 6, 1907. — January 27, 1908.

Present: KNOWLTON, C. J., LORING, BRALEY, & RUGG, JJ.

Covenant. Way. Judgment. Res Judicata.

If a grantee of land under a warranty deed, which conveys a right of way in an alleyway as appurtenant to the land, is evicted from the use of such alleyway by a paramount title, the covenant of warranty is broken.

In an action for a breach of a covenant of warranty in a deed of real estate, consisting of the plaintiff's alleged eviction from the use of an alleyway adjoining the premises in which the plaintiff was granted a right of way by the deed, the record of a judgment against the plaintiff in an action for trespass, brought against the plaintiff by a third person because of the plaintiff's use of the alleyway, is admissible in evidence to prove an eviction when supplemented by evidence showing that the title was put directly in issue and evidence that the defendant was informed that the action for trespass had been brought and was requested to defend the action and contest the claim of the third person.

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In an action for a breach of a covenant of warranty in a deed of real estate, consisting of the plaintiff's alleged eviction from the use of an alleyway adjoining the premises in which the plaintiff was granted a right of way by the deed, the plaintiff, to show an eviction, put in evidence the record of a judgment against him in an action for trespass brought by a third person because of his use of the alleyway. The declaration in the action for trespass consisted of two counts containing general allegations of title, with further averments of distinct trespasses, some of which related only to a use which might have been found to be in excess of the plaintiff's grant, while others rested upon a denial of his right to use the way for any purpose. All the allegations were put in issue by the answer, and there was a general judgment upon the merits for the third person who was the plaintiff in the action for trespass. The extent of the plaintiff's right of way in the alleyway was not defined in his deed. Extrinsic evidence was admitted from which it could have been found that the judgment in the action for trespass rested upon the sole ground that the third person who brought that action had a better title than the plaintiff. There was evidence that the defendant was informed of the action for trespass and was requested by the plaintiff to defend it. The presiding judge ruled that if the defendant was offered in a proper way the defence of the action for trespass the judgment was conclusive against him. *Held*, that this ruling was wrong; that after the evidence was presented it remained a question of fact for the jury to decide upon all the testimony, under suitable instructions, what issues actually had been tried and determined in the action for trespass in which the judgment was obtained, and that it was erroneous to say that as matter of law the defendant was estopped by the judgment to deny the eviction.

CONTRACT for the alleged breach of the covenants of warranty and quiet enjoyment contained in a deed from the defendant to the plaintiff of a parcel of land in Lawrence with the buildings thereon, dated September 16, 1902. Writ dated November 10, 1904.

In the Superior Court the case was tried before *Sherman*, J. The deed described the land as being on the corner of a certain alleyway and contained the words "together with the right to use said alleyway on the East side of said tract." These words were written in with a pen, the rest of the deed being typewritten. It appeared in evidence that the deed originally was drawn without these words, and when the deed was about to be delivered, the defendant was asked about the right of way and thereupon had the words inserted in the deed before delivery. The breach of covenant relied upon by the plaintiff was her eviction from the use of the alleyway. There was a two tenement house on the premises fronting on Tremont Street in the rear of and connected with which was a stable. The easterly line of the stable was within about six inches of the westerly

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line of the alleyway. The only entrance to the stable for horses was by a door which opened on the alleyway side in question. It appeared in evidence that the plaintiff's husband kept a horse for his own use in the stable.

The evidence showed that about a year after the purchase of the premises by the plaintiff, one Bergeron, who was the owner of a lot on the opposite side of the alleyway, attempted to stop the plaintiff from using the alleyway and began an action for trespass against her.

This action for trespass first was tried in the Lawrence Police Court, and judgment there was rendered in favor of the defendant in trespass, Richstein, from which judgment the plaintiff in trespass appealed, and in the Superior Court judgment was rendered for the plaintiff in trespass, Bergeron, on October 3, 1904, in the sum of one dollar. The record in the case of *Bergeron* v. *Richstein* was introduced against the objection of the defendant, who excepted to its admission. The judge ruled, that if the defendant properly was tendered the defence of this action of *Bergeron* v. *Richstein*, then the judgment was conclusive against him, to which ruling the defendant excepted. Among the records was the deposition of one Prescott, which was read to the jury by the plaintiff's counsel, and from which it appeared that Prescott testified that the alleyway always was fenced in at the northerly end, and that he, some time in May or June of 1890, put a fence across the entrance of the alleyway on Tremont Street; that upon looking up the records he found that it lacked a week or some few days of the time in which rights would be acquired in the use of the alleyway, and he put up the fence immediately; that this fence closed the entrance to the passageway completely, that it remained up two or three days, and that at the time he put up the fence he was the owner of a part of the premises in the block fronting on Broadway; that he put up the fence because he was afraid people would acquire a right of passage there.

Evidence then was introduced showing that the husband of the plaintiff, as the agent of his wife, saw the defendant after Bergeron had come out and stopped him driving in over the alleyway, which was before the action for trespass was brought, and told him, "that there was trouble about the place and that

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they wouldn't let him drive in the barn and that it was for Welch to come down and see that party." Shortly after, when Bergeron had brought the action against Mrs. Richstein, Mr. Richstein went again to see Welch. Mr. Richstein testified as follows: "I had the writ with me, and I showed it to him. I says, 'My woman is sued for that passageway to drive in to the barn.' He says, 'I don't care whether she is sued or not. I have nothing to do with that place any more.' I told him, I says, 'It is for you to take care of it, not me or my woman.' I says, 'Don't you know that you gave her a warranty deed of that right of way to the barn?' He says, 'I don't know anything about it. I have nothing to do with it.'"

The plaintiff testified that she went with her husband to see the defendant Welch and testified as follows: "When Mr. Richstein came in the yard, Welch came near the team and asked Mr. Richstein what you come, and he says, 'he has a note to go to court, — Mrs. Bergeron' — and to the question, 'Did you hear what they said' — she answered — 'and he said, well, I have nothing to do with the case. I sold you the property and that is all I know.'"

The defendant testified that before action was brought Richstein met him on the street and told him that the Bergerons were trying to stop him from using the alleyway but that Richstein and he never had any talk about a writ; that Richstein never came to him with a writ, and never asked him to take the trial of the case and never offered him the defence of the case of *Bergeron* v. *Richstein*. Evidence of the testimony at the trial of *Bergeron* v. *Richstein* then was introduced.

It appeared in evidence that at the trial of the case of *Bergeron* v. *Richstein* in the Police Court, and also in the Superior Court, the defendant was present and that he was a witness in the Superior Court; that after the decision in the case in the Superior Court the Richsteins were notified by either the sheriff or Mrs. Bergeron not to go in the barn any more and that the next morning when Richstein went to the barn Mrs. Bergeron came out and said to him, "You cannot take anything from the barn," and that she would n't even let him open the barn, and that thereafter Mrs. Richstein had no use of the barn or alleyway whatever.

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It also appeared that after the action and after the Bergerons had stopped Richstein from going into the barn, he went to see the defendant again and said to him, "What are you going to do?" and that he replied, "I ain't going to do anything. I have nothing to do with it. I have sold you this and that is all I am going to do."

It also appeared in evidence that at the trial of the case of *Bergeron* v. *Richstein* a witness testified that the alleyway had been fenced up within twenty years; that he kept a horse there, and one morning he came out to drive and could not and had to pull down the fence; that the clothes reel on the Richstein house was there when Mrs. Richstein bought the place, and it overhung the alleyway four and one-half feet, but was so high that it did not interfere with the passage of teams on the alleyway, and that the Bergerons ordered Richstein to remove the clothes reel.

There was no special finding in the case of *Bergeron* v. *Richstein* which disclosed the ground on which judgment for the plaintiff was rendered, and no evidence other than that stated in the bill of exceptions was introduced to show whether the judgment was founded upon the ground that Richstein had no title in the alleyway, or upon the grounds of the misuse and blocking of a common passageway.

The defendant then introduced a chain of title, which he contended showed by the deeds put in evidence that the defendant had a right to use the alleyway and a right to convey the right to use the alleyway to the plaintiff when he conveyed to her by warranty deed.

The defendant asked the judge to make the following rulings:

1. If he, (the grantor,) sells land on an alleyway, it gives grantee a right to use it.

2. The chain of title gives the defendant a right to use the passageway.

3. The defendant's record (apparently meaning the record of the action of *Bergeron* v. *Richstein*) is not competent at all.

The defendant's counsel began his argument, but had not finished at the adjournment of court. The next morning the defendant's attorney handed to the presiding judge fourteen requests for rulings.

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The judge said, "I cannot receive these requests, as they come too late." The defendant's counsel replied, "I know that; I do not expect them to be received as requests, but only as suggestions." Afterwards the counsel for the defendant attempted to read these requests to the jury, but this was not allowed by the judge.

The judge in his instructions to the jury said among other things: "The courts have decided that if a grantee with such a warranty goes to the grantor and says to him 'Now, I am sued; I want you to take and defend me;' gives him an opportunity to take and to defend the suit it controls the matter; if he does not do it, that binds him. The plaintiff offered some evidence — the husband of this plaintiff testified that he went to the defendant and gave him notice that he was threatened, and the defendant told him, 'Go back, you have a right to use that alleyway, pay no attention to it;' and finally, after he received the summons from the Police Court, that he went to the defendant and said to him: 'I am sued. You have given me a warranty deed, and I want you to defend me.' If the defendant had agreed that that was so, I should have said, that we have not to try this case over again to find where the title is, but that would end it, but the defendant denies that this is so, and objects to it, and I then said, 'Well, I will submit this to the jury, because where there is a dispute about a fact I have to submit it to the jury; because you are the gentlemen who have to decide the facts. I try to decide the law, and if I am wrong I am corrected by a higher court; but you are the gentlemen who have to decide the facts, and so I am going to submit this question to you: 'Did the defendant know that a suit was commenced by *Bergeron* v. *Richstein*, and was he requested by Richstein to take and defend the suit?'"

The judge submitted to the jury the following special question: "Did the defendant know that a suit was commenced by Bergeron against Richstein, and was he requested by Richstein, to take and assume the defence of that suit?" The jury answered this question in the affirmative.

The judge then instructed them as follows: "Gentleman, you having answered that question in the affirmative as you have, you have now to pass upon the question of damages between

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the parties; and the plaintiff is entitled to recover all reasonable expenses in defending that suit."

The jury then retired again, and returned a verdict for the plaintiff in the sum of $710. The defendant alleged exceptions.

W. Coulson, (*D. J. Coulson* with him,) for the defendant.

L. S. Cox, for the plaintiff.

BRALEY, J. If the plaintiff has been evicted by a paramount title from the easement in the alleyway which passed under the deed as appurtenant to the premises, the defendant's covenant of warranty was broken, and she became entitled to recover damages for the breach. *Gilman* v. *Haven*, 11 Cush. 330. *Tobey* v. *Taunton*, 119 Mass. 404. *Kramer* v. *Carter*, 136 Mass. 504, 507, 509. *Smith* v. *Richards*, 155 Mass. 79, 82.

Upon the estate was a stable used by the plaintiff's husband, the only entrance to which for horses was by a door which opened on the westerly side of the way, and a dispute as to her title having arisen between the plaintiff and one Bergeron, an abutting owner on the easterly side, he brought an action of tort in the nature of trespass in which he finally obtained judgment for nominal damages. At the trial, the plaintiff relied upon the judgment as conclusive proof of an ouster from any use of the way. If the defendant had not been notified of the former action, still the record was admissible to prove an eviction when supplemented by the evidence introduced by the plaintiff, that title was directly put in issue. *Merritt* v. *Morse*, 108 Mass. 270. But not having been originally a party to the action, he would not be concluded unless not only notice of the action was given to him, but he was tendered the opportunity to take upon himself its defence. The earlier practice was to vouch in the warrantor so that he would be estopped to deny the title by which the tenant suffered an eviction, and while formal notice in writing, because of the ease and accuracy of proof thereby afforded, is desirable, yet it may be oral. The warrantor whether he appears and defends, or makes default, is then considered in law so far a party or privy as to be concluded by the judgment. If the defendant was seasonably notified, and offered the defence, this was sufficient to enable him, if possible, to protect the title, and avoid an action for damages on his covenant. Oliver's Prec. (4th ed.) 840. Jackson on Real

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Actions, 14. *Chamberlain* v. *Preble*, 11 Allen, 370, 374. *Boyle* v. *Edmands*, 114 Mass. 373, 375. *Richmond* v. *Ames*, 164 Mass. 467, 476. *Consolidated Lasting Machine Co.* v. *Bradley*, 171 Mass. 127. No set form of words, however, being required, if the testimony of the plaintiff, and that of her husband, was believed, the defendant, notwithstanding his evidence, was fully informed not only that an action had been begun, but that the plaintiff's easement in the passageway was disputed, accompanied by a request to contest the claim. The jury were justified in answering this question in the affirmative, and the defendant's exception to the admission in evidence of the record cannot be sustained.

A more important question is the conclusiveness of the judgment. The declaration in the action for trespass consisted of two counts containing a general allegation of title, with further averments of distinct trespasses, some of which related only to a use which might have been found to be in excess of the plaintiff's grant, while others rested upon a denial of her right to use the way for any purpose. While all the allegations were put in issue by the answer, the judgment upon the merits was general, and may have been rendered upon either or all of the issues which could have been tried within the pleadings. But, if conclusive between the parties or their privies in a subsequent action for the same cause, this rule is inapplicable where the second action is for a different cause, unless it appears that the issue subsequently raised had been actually tried and determined in the first action. Although the defendant was estopped to deny his grant, yet, as the extent of the easement was not defined in the deed, oral evidence was competent to show the measure of this right as prescribed at the date of the conveyance. *Tobey* v. *Taunton*, *ubi supra*. If it were found, that the grantee either had exceeded her rights, or was without title because her grantor was not seised, the plaintiff in the first action was entitled to judgment. To ascertain what questions had been decided, the parties were accordingly permitted to introduce extrinsic evidence from which it could have been found that the decision rested upon the sole ground that Bergeron had the better title. But even then, it finally remained for the jury under suitable instructions to decide upon all the testimony,

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what issues had been actually tried and determined. The ruling, that as matter of law the defendant was estopped by the judgment, was wrong. *Foye* v. *Patch*, 132 Mass. 105, 110, 111. *Cotter* v. *Boston & Northern Street Railway*, 190 Mass. 302, 303, where the later cases are collected.

Because of this error there must be a new trial, and we do not deem it necessary to consider other questions raised by the exceptions.

Exceptions sustained.

CHARLES S. GILL & others, executors, *vs.* ATTORNEY GENERAL & others.

Suffolk. March 15, 1907. — February 24, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Charity. Devise and Legacy. Words, "Charitable persons."

The gift by a testator of the residue of his estate to his executors in trust to convey and transfer it to such institutions or natural persons as they may select, to be held by such institutions or natural persons in trust to be applied by them to charitable objects, is a valid gift to charity.

The residuary clause of a codicil was as follows: "All the rest and residue of my estate of every character and description, I give to my executors named in said will, in trust nevertheless to distribute the same among such charitable institutions, persons or objects, in such amounts, upon such terms, and for such purposes, as they decide to be most worthy, having regard, but in their sole discretion, to such as I have been interested in during my life." *Held,* that the word "charitable" qualified "persons" and "objects" as well as "institutions," and that the term "charitable persons" was not used to designate persons of a philanthropic turn of mind, but meant that the persons selected should take the property transferred to them by the executor in trust to be applied by them to objects of charity, which made the gift good as a public charitable trust.

Where a gift is made by will for a specific charity alone and not for a general charitable purpose, if the performance of the specific purpose has become impossible the gift fails and the doctrine of *cy pres* does not apply, and for that reason in the present case it became unnecessary to consider whether the specific purpose set forth in a certain clause in the will, if it had been possible of execution, would have been a charitable one which would make a perpetual trust valid.

BILL IN EQUITY, filed in the Probate Court for the county of Suffolk on August 4, 1906, by the executors of the will of Ednah Dow Cheney, late of Boston, for instructions.

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The testatrix, who was a widow without issue, died on November 19, 1904, leaving certain first cousins as her only heirs at law and next of kin. Her will and a codicil thereto were proved on December 22, 1904, and the plaintiffs were appointed executors.

After disposing by her will and codicil of a large part of her estate, the testatrix in the sixth clause of the codicil provided as follows:

"Sixth: I appoint Mary Cheney, Frank Cheney, Jr., Ednah D. Cheney, Mary B. Cheney, Harriet Cheney, Anna Cheney and Rosalie Goodman, or such of them as may survive me, trustees, and I give to them and their successors in trust the sum of three thousand dollars, to hold and dispose of the same in and upon the following trust, viz: to establish and maintain some suitable room or rooms in South Manchester, Connecticut, for the preservation and exhibition under such rules and regulations as said trustees may make, of all the pictures, books, manuscripts, and any other relics of Seth W. Cheney, Margaret S. Cheney and John Cheney, and any other objects of interest, with the exception of the personal gifts mentioned in my will to relatives or friends. I desire that the crayon of S. W. Cheney by Kimberly shall be placed in this room, also the portrait of the old man, which I give to said trustees, and not, as in my will to Mrs. Emma L. Cheney. I also give to said trustees for said room all drawings, paintings, sculpture and other articles which in my will are given to Annie and Alice Cheney. In case of a vacancy among said trustees by death, or resignation, or any other reason, I give the remaining trustees power to fill said vacancy by a majority vote, and the new trustee shall have the same power and duties as if originally appointed, and this power to fill vacancies may be exercised from time to time as the same occurs. I desire that said trustees, whether original or substitute, may be exempt from giving a surety or sureties upon their bonds. I authorize said trustees to receive from other persons such gifts of money or objects for exhibition as may help to carry out the purpose of said trust. Said trustees, or their successors, may, at any time should they deem it wise to give up the same as an independent trust, surrender the same with all trust property to the Town of South Manchester, Connecticut,

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to become a part of a public library in said Town, but upon condition that the same shall never be removed from said Town of South Manchester."

The residuary clause of the codicil was as follows:

"All the rest and residue of my estate of every character and description, I give to my Executors named in said will, in trust nevertheless to distribute the same among such charitable institutions, persons or objects, in such amounts, upon such terms, and for such purposes, as they decide to be most worthy, having regard, but in their sole discretion, to such as I have been interested in during my life."

The trustees named in the sixth clause declined to accept the trust. After satisfying the specific legacies, there were practically no pictures, books, manuscripts or other relics of Seth W. Cheney, Margaret S. Cheney or John Cheney and no other objects of interest to preserve or exhibit, and no good purpose would be served in establishing the room referred to.

The income from the sum of $3,000 would be insufficient to defray the expenses of rent, light, heat and care of the room. There is no town of South Manchester, Connecticut. The village of South Manchester is a part of the town of Manchester, Connecticut, and there already is established in that village a library and reading room which amply accommodate the citizens, and there is no need of anything further of the kind there.

After the payment of the bequests, debts, and charges of administration, there would remain in the hands of the plaintiffs for distribution, a balance exceeding $30,000.

The bill prayed for instructions upon the following questions:

"Is the trust established in the sixth clause of the codicil a valid trust?

"If valid, is the trust, under the circumstances now existing, capable of practical enforcement?

"If not, what disposition shall be made of the $3,000 given therein?

"Is the residuary clause void?

"Are the heirs at law and next of kin entitled to receive the residue of the estate, or is it to be distributed by the executors in charity?"

In the Probate Court *Grant*, J., made a decree declaring that

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by the sixth clause of the codicil the testatrix created a valid charitable trust with a specific charitable intent, that it was impracticable to carry into effect the purpose of the testatrix, and that the trust had failed, and ordering that the $3,000 trust fund be held by the executors as part of the residue of the estate; also declaring that, owing to the language employed by the testatrix in the residuary clause of the codicil, no valid charitable or private trust was created, and that an implied trust arose in favor of the heirs at law of the testatrix, ordering that the executors should distribute among the heirs at law and next of kin of the testatrix, to be ascertained as of the date of her death, that part of the residuary fund of the estate of the testatrix which should remain in their hands for distribution.

The Attorney General appealed, stating as grounds of appeal that the sixth clause of the codicil created a valid public charitable trust, which it was not impracticable to carry into effect, and that by the residuary clause of the codicil the testatrix created a valid public charitable trust and that this clause manifested a general charitable intent.

The appeal came on to be heard before *Rugg*, J., who by request of all the parties reserved it for determination by the full court, such order to be entered as justice might require.

The case was argued at the bar in March, 1907, before *Knowlton*, C. J., *Hammond*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

D. Malone, Attorney General, *F. T. Field*, Assistant Attorney General, for the Attorney General.

O. B. Mowry, for the executor of the will of Charles Saville, one of the next of kin of the testatrix.

W. P. Everts, (*R. M. Morse* with him,) for the executor of the will of Sarah A. Dearborn, and another.

G. A. O. Ernst, for the plaintiffs.

LORING, J. 1. We are of opinion that the word "charitable" in the residuary clause must be taken to qualify "persons" and "objects" as well as "institutions." See in this connection *Hooper* v. *Shaw*, 176 Mass. 190; *Suter* v. *Hilliard*, 182 Mass. 412; *Schleicher's estate*, 201 Penn. St. 612; *Wilkinson* v. *Lindgren*, L. R. 5 Ch. 570; *Baker* v. *Sutton*, 1 Keen, 224; *Fox* v. *Gibbs*, 86 Maine, 87.

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It is the contention of the next of kin that even if that is so the gift is void. Their contention is that a charitable person means a person devoted to charity. And it must be conceded that if that is what the words charitable persons mean in this gift the gift is void within the rule laid down in *St. Paul's Church* v. *Attorney General*, 164 Mass. 188, 195, and acted upon in *Minot* v. *Attorney General*, 189 Mass. 176, namely, where property is to be distributed by executors between one or more objects which are charitable and one or more which are not, the gift fails as a gift for charity.

A gift of a residue or of other property to an executor "to be disposed of by him for such charitable purposes as he shall think proper" is a valid gift in trust for charity. *Minot* v. *Baker*, 147 Mass. 348 and cases there cited. In *Minot* v. *Baker*, *ubi supra*, the executor died without having applied all the trust fund to charity and a new trustee was appointed to administer the trust. From this it follows that the gift of the residue here in question so far as it is a gift to be applied by the executors to "charitable" "objects" is a valid charity.

But not only may a testator give his property to his executors in trust to be applied by them in charity, but he may give it to his executors to be transferred and conveyed by them to a corporation thereafter to be established by them to be held by that corporation in trust for charity. That was decided in *Codman* v. *Brigham*, 187 Mass. 309. In such a case "nothing passes directly to the corporation under the will. It takes through a conveyance from the trustees [executors] made in the execution of their trust. . . . The corporation is simply a part of the machinery to be provided by the trustees [executors] the better to execute the charitable purpose of the testator." Knowlton, C. J., in *Codman* v. *Brigham*, 187 Mass. 309, 313.

There can be no distinction between a gift of property to an executor to be conveyed by him to a corporation thereafter to be established, to be held by that corporation in trust for a charitable purpose; and a gift to an executor to be by him conveyed to an existing institution or to a natural person to be selected by him to be held by that institution or natural person in trust for a charitable purpose.

If therefore the gift of the residue now in question is to be

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construed to be a gift of it to the executors in trust to convey the same to such institutions or natural persons as they may select, to be held by such institutions or natural persons in trust to be applied by them to charitable objects, there can be no question of the gift being a valid gift to charity. As was said in *Codman* v. *Brigham*, the institutions and persons selected to dispense the residue given by the testator in charity are simply a part of the machinery provided to execute the charitable purpose of the testator.

A majority of the court are of opinion that that is what is meant by the gift here in question to the executors "in trust nevertheless to distribute the same among such charitable institutions or persons, . . . in such amounts, upon such terms, and for such purposes as they decide to be most worthy, having regard but in their sole discretion to such as I have been interested in during my life."

For while in other connections, or indeed if used alone and not in connection with other words, a "charitable person" doubtless means a person of a philanthropic turn of mind, yet the words "charitable persons" used in connection with the words "charitable institutions" cannot be construed to mean or even to include such persons. But on the contrary the word "charitable," in our opinion, when applied to persons in the gift here in question, means what that word means when applied to "institutions," namely, persons who will take the property transferred to them by the executor in trust to be applied by them to charitable objects.

The result is that the executors are themselves to apply the residue to objects of charity, or they are to transfer it over to institutions or individuals to be held by them in trust to be applied by them to objects of charity.

2. We are of opinion that the gift contained in the sixth clause of the will, if valid, has failed, and that if it was a charitable gift at all it was for a specific charity alone. If this was a valid gift at all, on the admitted facts it has failed and the property falls into the residue. *Teele* v. *Bishop of Derry*, 168 Mass. 341.

It follows that the Probate Court was right in holding that the $3,000 fell into the residue, and was wrong in holding that

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the gift of the residue not being a valid charitable gift the residue of the estate was to be distributed "among the heirs at law of the testatrix."

Decree accordingly.

PETER McTIERNAN *vs.* AMERICAN WOOLEN COMPANY.

Essex. November 8, 1907. — February 24, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, & RUGG, JJ.

Negligence, Employer's liability. *Evidence.*

In an action at common law by a boy against the proprietor of a woolen mill in which he was employed, for injuries incurred from falling into a vat of boiling water while the plaintiff was engaged in mixing dye powders in a pail one foot away from the vat, which when mixed were to be put into the boiling water to make dye, if it appears that the floor, which was covered with zinc, might have been slippery owing to the negligence of a fellow servant of the plaintiff in dropping soft soap on it, and that, whether the floor was slippery or not, another fellow servant of the plaintiff gave him a push or "jolt" so hard that he whirled around two or three times, slipped on the floor and fell into the vat, there is no ground for holding the defendant liable for either of these acts or for both of them combined.

In an action at common law by a boy against the proprietor of a woolen mill in which he was employed, for injuries incurred from falling into a vat of boiling water while the plaintiff was engaged in mixing dye powders in a pail one foot away from the vat, which when mixed were to be put into the boiling water to make dye, it appeared that the vats, which were without covers, were put into the mill three months after the plaintiff entered the defendant's employment, but that the plaintiff had continued to work there about eight months after the vats were installed in the mill without covers. The plaintiff offered to prove that the vats were made by the defendant, that covers were made for them, that the plaintiff had helped to carry the vats up to the room where they were installed, that he asked the overseer whether he should bring up the covers, and that the overseer had said no, that they would not use the covers, and that the covers never were used while he was at work there. This evidence was excluded. *Held*, that the exclusion was right; that the plaintiff by continuing to work after the vats were installed without covers assumed the risk of any accident caused by the absence of covers in the same way that he would have assumed it if the vats had been installed without covers before he was employed; and, moreover, that, in the absence of evidence to that effect, it could not be assumed that if the covers had been in use they would have been on the vats at the time of the accident, when the making of the dye had begun and the vat into which the plaintiff fell had been filled with boiling water to receive the dye powders which were being mixed in a pail within a foot of the vat to be poured into it and boiled there as soon as the mixing was finished.

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TORT, at common law, by a boy between seventeen and eighteen years of age when injured, for personal injuries incurred on May 6, 1903, while employed in a woolen mill of the defendant at Lawrence, alleging that the plaintiff was put to work in a place which was unsafe and dangerous by reason of the improper construction of a certain dyeing vat and the floor about it and the want of repair of a barrel near the vat from which it was alleged that soft soap leaked upon the floor so that in conjunction with the vat it became dangerous and unsafe, and that the plaintiff while at work slipped on the floor and fell into the vat, then filled with hot water, and was scalded. Writ dated November 9, 1904.

At the trial in the Superior Court before *Sherman*, J., evidence was introduced of the facts which are stated in the opinion.

The judge ruled that upon the evidence the jury would not be warranted in returning a verdict for the plaintiff. He ordered a verdict for the defendant; and the plaintiff alleged exceptions to this ruling and to the exclusion of certain evidence which is described in the opinion.

J. P. Sweeney, *H. R. Dow & L. S. Cox*, for the plaintiff, submitted a brief.

W. H. Hitchcock, for the defendant.

LORING, J. The accident here complained of happened in this way. While the plaintiff "was stooping down mixing dye in a pail," he "was pushed" or given a "jolt" by a fellow employee. The "push" or "jolt" was so hard a one that he was turned or whirled around two or three times, slipped on the floor, and fell into a vat of boiling water.

At the time of the accident the dye was being made in the usual way, and that way was as follows. The dye, which comes in the form of a powder, is first mixed in a pail and then is poured into a vat of boiling water, where it is boiled for fifteen or twenty minutes. The vat had been filled with the boiling water and the plaintiff was mixing the dye powder in a pail which was about a foot away from the vat and between the plaintiff and the vat. The vat in question was "set upon the floor," and was one and three quarters feet deep, three and a half feet long, and one and a half feet wide. This vat, together with three others similar to it and another one substantially

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similar, was installed about three months after the plaintiff entered the defendant's employment.

When the plaintiff entered the defendant's employment he "was set to work" carrying bobbins in trucks to the spinning frames. At that time the dye was made by a section hand named Wolfindale, who left about two months before the accident. While Wolfindale was with the defendant it was the duty of the plaintiff to get the dye powder from the dye house and bring it to him. It is stated that the plaintiff used to watch Wolfindale mix the powder, and it must be inferred that he thereby learned how to do that work, for when Wolfindale left and his place was taken by a man named Hayes who did not know how to mix the dye, the plaintiff was told to do that work, and did so for a time, up to the day of the accident.

The floor in question was covered by zinc. There was evidence that there was a barrel of soft soap left near the vats, and that the soap was used in washing the floor.

The presiding judge directed the jury to find a verdict for the defendant, and the case is here on an exception to that ruling and to a ruling excluding evidence offered by the plaintiff.

The plaintiff's first contention is that the accident was caused by a slippery floor. It might well be doubted whether the evidence would have warranted a finding that the floor was slippery. The plaintiff testified that when he got out of the vat "he did not notice the floor, but that afterwards, when he came to his senses, he bethought that the floor might be slippery; that it used to be slippery once in a while with the soap; that people would take soap out of the barrel and would let it drop on the floor; that he had seen the zinc both dry and slippery; that when he fell he could not regain his footing. Subject to the defendant's exceptions, he testified that he thought the floor was wet with water and with soap." It may be doubted whether this was enough to warrant a finding that the floor was slippery at the time of the accident.

If the evidence did warrant a finding that the floor was slippery, the proximate cause of the injury was either the slippery floor or the "jolt" given to the plaintiff by his fellow employee, or the two combined. But for neither of these is the defendant liable. Both came from the negligence of a fellow servant.

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The plaintiff offered to prove "that the vats were made by the defendant, that covers were made for them; that the plaintiff had helped to carry the vats up to the room where they were installed; that he asked the overseer if he should bring the covers up, and that the overseer said no, that they would not use the covers, and the covers were never used while he was at work there." This was excluded. We are of opinion that the presiding judge was right in excluding it. In the first place, the plaintiff had continued to work for the defendant for nearly eight months after the vats were installed without covers. That puts the case on the same footing that it would have been on had the vats been installed before the plaintiff was employed, and the case at bar comes within *Tinkham* v. *Sawyer*, 153 Mass. 485; *Murphy* v. *American Rubber Co.* 159 Mass. 266. But apart from that, if the defendant had adopted covers as part of the vats, we cannot assume, in the absence of an offer of evidence to that effect, that they would have been on the vats at the time of the accident. At that time the making of the dye had been begun, the vat had been filled with boiling water to receive the dye, and the dye was being mixed within a foot of the vat, to be poured into the vat and boiled there when the mixing was finished.

Exceptions overruled.

WILLIAM C. DOHERTY *vs.* INHABITANTS OF AYER.

Middlesex. November 20, 1907. — February 24, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Public, Defect in highway. *Automobile*. *Statute*. *Evidence*, Presumptions and burden of proof. *Words*, "Carriages."

The "carriages" referred to in R. L. c. 51, § 1, requiring cities and towns to keep public ways reasonably safe at all seasons for travellers "with their horses, teams and carriages," are those drawn by animal power.

An automobile is not a "carriage" within the terms of R. L. c. 51, § 1, requiring cities and towns to keep public ways reasonably safe and convenient at all seasons for travellers "with their horses, teams and carriages."

Cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken in automobiles; but, if their ways are reasonably safe and convenient for travel generally, they are

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not liable for damage resulting from a failure to make special provisions which are required only for the safety and convenience of persons using automobiles.

At the trial of an action of tort against a town under R. L. c. 51, § 18, for damage to the plaintiff's automobile alleged to have been caused by a defect in the highway, it appeared that a street railway company in the process of laying its tracks had uncovered a level stretch of sand throughout the entire width of the way and extending for thirty feet to one side of the location of the way, and had obliterated the marks of travel, but allowed travel upon the way. The plaintiff's automobile was injured through becoming stuck in the sand, but there was conflicting evidence as to whether the accident happened within the travelled part, or entirely outside of the location of the way. The presiding judge instructed the jury that "it was not of any great importance whether the accident happened without the limits of the road, provided, in the opinion of the jury, the sand was a dangerous place, because the town would be obliged to properly protect travellers by barriers or otherwise against such a danger even if it were outside the limits of the highway." *Held*, that the instruction was erroneous, since there was no evidence of such a dangerous condition as to call for the erection of a barrier to keep travellers from passing out of the road; and that therefore the jury should have been instructed that, if the accident happened outside of the limits of the way, the defendant was not liable.

At the trial of an action of tort against a town under R. L. c. 51, § 18, for damage to the plaintiff's automobile alleged to have been caused by a defect in a highway, it appeared that the plaintiff was travelling upon the way in an automobile, but there was no evidence introduced either by the plaintiff or by the defendant that he was licensed to operate an automobile or that the automobile was registered as required by Sts. 1903, c. 473; 1905, c. 311. *Held*, that, while, if it had appeared affirmatively that the plaintiff was travelling on the highway without either the registration of or the license to operate the automobile which were required by the statutes, he would have been without remedy, in this case, there being no proof of such violation of law by him, he was to be presumed to have been innocent thereof and to have been using the way lawfully.

TORT under R. L. c. 51, § 18, for damage to the plaintiff's automobile alleged to have been caused by a defect in Sandy Point Road in the defendant town, which the defendant was bound to keep in repair. Writ in the Superior Court for the county of Middlesex dated June 23, 1906.

There was a trial before *Stevens*, J. The facts in evidence are stated in the opinion.

No evidence was introduced by the plaintiff or defendant showing whether or not the plaintiff was licensed to operate an automobile upon the public highways, or whether his automobile was registered, according to the requirements of Sts. 1903, c. 473; 1905, c. 311.

At the close of the evidence, the defendant requested the presiding judge to rule that on all the evidence the plaintiff was not entitled to recover; that there was no evidence which

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would warrant the jury in finding that the way was defective; that, "if the defect in the way was one which would not be dangerous to ordinary vehicles, the plaintiff could not recover, even though the jury found it was a defect which was dangerous to the plaintiff's automobile"; and that, "if the jury found that the road was reasonably safe for travel of the ordinary kinds they would not be warranted in finding it defective merely because it was not fit for the use of automobiles." When making of these requests, for the first time, the defendant called the attention of the presiding judge to the lack of evidence of registration of the automobile or license of the plaintiff to operate it.

The requests were refused, and in his charge the presiding judge gave the instructions set forth in the opinion, and the defendant excepted.

J. M. Maloney, for the defendant.

W. A. Hogan, for the plaintiff.

KNOWLTON, C. J. This action was brought to recover for damage to the plaintiff's automobile, alleged to have been caused by a defect in a highway which the defendant was bound to keep in repair. The road at the place of the accident was being reconstructed by the Lowell and Fitchburg Street Railway Company, which was preparing to lay a track on a location partly within the highway on its southerly side and partly on private land outside of it. There was a fence on the north side of the road, but no fence or wall on the southerly side. The old travelled way, before the work of reconstruction began, was from sixteen to twenty feet wide. Between the travelled way and the fence on the north side there was a grass-covered space between three and four feet wide. On the south side there was a grass-covered space between three and four feet wide, and then the ground sloped upward, and was covered with a growth of birches and other trees. In preparing the place for the railway, the grade of the highway and for a space from twenty to thirty feet south of it, was cut down a distance of between twenty-four and forty-two inches, leaving a surface of sand three hundred or four hundred feet in length through the entire width of the road, and for a distance of twenty or thirty feet south of the road. The road was in constant use, and the

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workmen upon it had orders to assist heavy teams if necessary, and sometimes they did so. The road was always left level, with no holes.

The plaintiff was familiar with the road and knew that work was going on there. He went over it with his automobile, on his way from Lowell to Ayer, early in the afternoon. On his return in the evening his machine ran upon the sand about twenty feet and then stopped. The road was level, and the only imperfection in it was its sandy condition. He made two unsuccessful attempts to get the machine out of the sand, but the wheels had sunk to a depth of eight to ten inches. He then got a horse, and with the help of laborers who shovelled sand from in front of the wheels, and with the use of his engine, and the pulling of the horse and the men, he got the machine out of the sandy place. In doing this he broke the automobile. The evidence was conflicting as to whether the place of the accident was within the travelled part of the old highway or entirely outside of the location of the way. The jury in returning their verdict answered "Yes" to the question, "Was the place of the accident reasonably safe for the travel of carriages other than automobiles?" The judge instructed the jury that an automobile was a carriage, within the meaning of the R. L. c. 51, § 1, and that it was the duty of the defendant, under that statute, to keep its roads reasonably safe and convenient for automobiles, so that they might be protected. To this instruction the defendant excepted.

The question presented by this exception has never been decided by this court. It was raised in *Baker* v. *Fall River*, 187 Mass. 58, but it was immaterial to the decision, and the court refrained from considering it. The opinion contains this language: "Therefore we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety." The dictum in *Richardson* v. *Danvers*, 176 Mass. 413, 414, referred to in the opinion in *Baker* v. *Fall River*, was made without any thought of such a question as is now before us. This appears from the earlier statement in the same case, which is made the foundation of the decision that a bicycle is not a carriage within the meaning of the statute. Referring to the statute, which was first enacted in St. 1786, c. 81, § 1, and re-enacted in the Rev.

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Sts. c. 25, § 1, Gen. Sts. c. 44, § 1, and Pub. Sts. c. 52, § 1, Mr. Justice Lathrop said, "Although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles *ejusdem generis*, and that it does not extend to bicycles." It hardly can be contended that locomotive cars of many tons' weight, propelled by a gasoline engine or a steam or electrical engine with complicated machinery, capable of developing fifty or seventy-five horse power, and sometimes even more, are vehicles *ejusdem generis* as the carriages known to the legislators of Massachusetts in 1786. It was shown in the opinion from which we have just quoted that, under many statutes, a bicycle is held to be a carriage. It is a vehicle that is used in carrying one or more persons. But it was also said that "it is more properly a machine than a carriage." This is equally true of an automobile. It is a carriage in a broad sense of the word. But its features as a piece of machinery are far more striking than those which it possesses as a carriage. It is commonly spoken of as a machine. In the bill of exceptions before us the plaintiff's vehicle is repeatedly called a machine. Cars on steam railroads in England are called carriages, and some railroad cars are referred to in this country as coaches; but these are not such carriages as were intended by the framers of this statute. When towns were first required by law to keep their highways and town ways "reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons of the year," there was no thought of putting upon them such a burden as would be imposed if they were compelled to keep all of these ways in such a condition that automobiles could pass over them safely and conveniently at all seasons. Horses, teams and carriages are grouped together in the statute, and the carriages referred to are those drawn by animal power.

There are many highways and town ways that run into remote places and are but little travelled. In some parts of the State that are very sparsely settled there are vast stretches of sandy surface, traversed by roads that are but little used, where the small wheels of a heavy automobile might sometimes encounter as great an obstacle to progress as the plaintiff's vehicle encountered on the smooth, level sand at the place of this accident. To be obliged to harden all such roads would be a burden upon

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towns heavier than could be borne. There are steep mountain roads laid out for the use of but a small part of the public, where, in a heavy rain, water flows down with much force. This must be turned off from the travelled part of the road by high and sharp water bars. It would be unreasonable to require all such roads to be made convenient for travel with automobiles at all seasons. There are also roads that are frozen to a great depth in winter, which sometimes present a surface of very deep, soft mud while the ground is thawing in the spring. No reasonable expenditure by towns would be enough to make all such roads convenient for the use of heavy automobiles, with their small wheels, at all seasons. Another difficulty sometimes appears upon such roads when they are suddenly frozen, after having been rutted in a time of deep mud. Such roads could not be made safe and convenient for use by automobiles at such times without entire reconstruction.

An automobile is not a carriage within the meaning of that word in the R. L. c. 51, § 1. Persons may lawfully ride in automobiles, as they may lawfully ride on bicycles, and cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles. *Gregory* v. *Adams*, 14 Gray, 242, 248. But if their ways are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using automobiles or bicycles. The law applicable to the present case is that stated in *Baker* v. *Fall River*, 187 Mass. 53, *Richardson* v. *Danvers*, 176 Mass. 413, *Rust* v. *Essex*, 182 Mass. 313, and *Spring* v. *Williamstown*, 186 Mass. 479.

There was error in the instruction that, the cutting down of the grade having obliterated the marks of travel, it was not of any great importance whether the accident "happened without the limits of the old road as above described, provided, in the opinion of the jury, the sand was a dangerous place, because the town would be obliged to properly protect travellers, by barriers or otherwise, against such a danger, even if it were outside the limits of the way." The jury should have been instructed that, if the accident happened outside of the limits of the way, the town was not liable for it, as there was no obligation to keep in

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repair land outside of the boundaries of the way, and that there was no such dangerous condition there as called for the erection of a barrier to keep travellers from passing out of the road. In *Damon* v. *Boston*, 149 Mass. 147, 151, Mr. Justice Allen said, "the danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets and sidewalks, and unsuitable for travel, are often left open in both country and city and a town or city is not bound to fence against them unless their condition is such as to expose travellers to unusual hazard." The same doctrine is also applied and strongly stated in *Adams* v. *Natick*, 13 Allen, 429, 431, and *Marshall* v. *Ipswich*, 110 Mass. 522. See also *Stockwell* v. *Fitchburg*, 110 Mass. 305, *Stone* v. *Attleborough*, 140 Mass. 328, and *Macomber* v. *Taunton*, 100 Mass. 255.

The defendant's contention that the plaintiff could not recover for want of proof that he was licensed to operate an automobile upon the public highways and that his automobile was registered according to the requirements of the St. 1903, c. 473, as amended by the St. 1905, c. 311, is not well founded. If it appeared affirmatively that he was travelling without a proper registration of the vehicle, or without a license to operate it, it might well be held that he was not a traveller on the highway in a legal sense, and that the town owed him no duty under the statute. He would be within the principles stated in *Richards* v. *Enfield*, 13 Gray, 344, *Higgins* v. *Boston*, 148 Mass. 484, *Blodgett* v. *Boston*, 8 Allen, 237, and *Tighe* v. *Lowell*, 119 Mass. 472. Section 5 of the St. 1903, c. 473, declares that, "except as hereinafter provided, no person shall, on or after the first day of September in the year 1903, operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute, unless licensed so to do under the provisions of this act." In § 3 there is a similar provision in regard to the operation of an automobile unless it is registered. Penalties are prescribed for a violation of these provisions.

Inasmuch as the plaintiff was upon the road only as one riding in and operating an automobile, if it was unregistered and if he was unlicensed, he had no relation to the highway and he was in no sense a traveller except as a violator of the law in reference

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to the use that might be made of the way. In regard to the right of recovery, his violation of this law would not be treated as mere evidence of negligence that was not a direct and proximate cause of the accident, or as only a condition which was not fatal to his claims. See *Newcomb* v. *Boston Protective Department*, 146 Mass. 596; *Steele* v. *Burkhardt*, 104 Mass. 59; *Spofford* v. *Harlow*, 3 Allen, 176; *Kidder* v. *Dunstable*, 11 Gray, 342. Without determining whether the court would now follow the decision of the majority of the justices in *Smith* v. *Boston & Maine Railroad*, 120 Mass. 490, and the doctrine stated in some of the cases therein cited, we are of opinion that a violation of the statute in this particular so affects the direct relation of the violator to the town, in regard to the way and the only use that he was making of it, as to leave him without remedy for an injury caused by a defect in the way.

So far as appears the automobile was duly registered and the plaintiff was duly licensed. The evidence tends to show that the plaintiff was a traveller lawfully using the way. Presumptions both of law and fact are always in favor of innocence. In cases somewhat analogous, when one would avoid liability on the ground of a violation of law by the plaintiff, he must prove the violation. *Goddard* v. *Rawson*, 130 Mass. 97, and cases there cited. See also *Temple* v. *Phelps*, 193 Mass. 297.

In the present case the evidence introduced by the plaintiff made a *prima facie* case in his favor on this point.

Exceptions sustained.

ROBERT H. McCURDY & another, executors, *vs.* ROBERT H. McCURDY & another, trustees, & others.

Middlesex. December 4, 1907. — February 24, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, On collateral legacies and successions. *Equitable Conversion. Executor and Administrator.*

The only ground on which the tax provided by R. L. c. 15, § 1, relating to the taxation of collateral legacies and successions, can be imposed upon the succession to property of a non-resident testator is that the property is within the jurisdic-

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tion of this Commonwealth at the time of the testator's death; and, where such a testator dies leaving real estate in this Commonwealth subject to a mortgage, the value of the testator's interest in the real estate at the time of his death is only the value of the equity of redemption, and that alone is subject to the tax.

The law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question to be determined is one of jurisdiction over property as between States.

A testator domiciled in another State died seised of real estate in this Commonwealth which was subject to a mortgage held by a creditor here, and also left other property insufficient in amount to satisfy the mortgage. The executor of the will brought a bill in equity for instructions as to whether the tax on collateral legacies and successions, provided by R. L. c. 15, § 1, should be assessed upon the value of the real estate without deducting the amount of the mortgage or only upon the value of the equity of redemption. *Held*, that the executor could not be compelled to bring the proceeds of personal estate from the place of domiciliary administration in another State to pay off the mortgage here in order to leave the property free from incumbrance and subject to a tax on its full value.

BILL IN EQUITY by the executors under the will of John Albro Little for instructions, filed in the Probate Court for the county of Middlesex September 26, 1907.

On appeal the case was heard in this court before *Hammond*, J., who reserved it for the consideration of the full court. The facts are stated in the opinion.

W. B. Durant, for the trustees and others.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the treasurer and receiver general of the Commonwealth.

KNOWLTON, C. J. This is a bill for instructions to the plaintiffs as executors of the will of John Albro Little, late of Morris Plains in the State of New Jersey, deceased. The testator left real estate in Massachusetts whose value, as appraised, if free from encumbrances, is $241,000. This is subject to a mortgage to the Cambridge Savings Bank of $120,000 and interest. He also left personal estate here to the amount of about $9,000, and an undivided interest in other real estate, which was appraised at about $12,000. In regard to this interest and the personal estate no question arises. The question before us is whether the collateral inheritance tax to be paid under the R. L. c. 15, §1, shall be computed upon the value of the property without deduction for the encumbrance of the mortgage, or upon the value of the equity of redemption.

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The testator was a non-resident, and by the terms of the statute the tax on the succession is only upon "property within the jurisdiction of the Commonwealth." The property in question is subject to a lien in favor of a Massachusetts creditor of the testator. The value of the testator's interest in it at the time of his death was only the value of the equity of redemption. The savings bank is entitled to be paid out of the real estate if not paid otherwise. If it should proceed to collect its debt by an action at law against the executors, they would be obliged, acting only in their official capacity under their appointment in Massachusetts, to obtain a license to sell this real estate for the payment of the debt, in which case all that would remain within the jurisdiction of the Commonwealth would be the excess of the proceeds of the real estate above the amount of the indebtedness under the mortgage. If the savings bank should foreclose its mortgage by a sale, the result would be the same.

The Attorney General, in behalf of the treasurer and receiver general of the Commonwealth, contends that the doctrine of equitable conversion and exoneration should be applied to relieve the land from the encumbrance of the mortgage, and that the executors should bring the proceeds of personal estate from the place of domiciliary administration in New Jersey and apply it to the payment of the debt here, so as to leave the land, free from the encumbrance, within the jurisdiction of the Commonwealth.

The answer to this contention is, first, that the rights and obligations of all parties in regard to the payment of a tax of this kind are to be determined as of the time of the death of the decedent. This has been settled by our decisions. *Hooper* v. *Bradford*, 178 Mass. 95. *Howe* v. *Howe*, 179 Mass. 546. *Kingsbury* v. *Chapin*, 196 Mass. 533. Secondly, the law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different States. In *Custance* v. *Bradshaw*, 4 Hare, 315, 325, it was said that "equity would not alter the nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state." In *Matter of Offerman*, 25 App. Div. (N. Y.) 94, the court says that equitable conversion should not be invoked

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merely for the purpose of subjecting the property to taxation. To the same effect is *Matter of Sutton*, 3 App. Div. (N. Y.) 208; affirmed in 149 N. Y. 618. In Pennsylvania a different rule is established. *Handley's estate*, 181 Penn. St. 339.

The only ground on which such a tax can be imposed upon the succession to property of a non-resident is that the property is within the jurisdiction of the Commonwealth. For the purpose of increasing the amount within our jurisdiction the executors or administrators here cannot be compelled to bring the proceeds of personal estate from the place of domiciliary administration in another State, to pay debts of Massachusetts creditors, secured by a mortgage or lien upon land in this Commonwealth. Indeed, if the ancillary administrators were different persons from the domiciliary administrators or executors, they could not obtain such proceeds for such a use in a foreign State. If the property subject to ancillary administration was not enough to pay local creditors, these creditors would be obliged to resort to the domiciliary administrator.

In this State and in New York it is decided that personal property within the jurisdiction of a foreign State is subject to a succession tax in the place of the decedent's domicil. *Frothingham* v. *Shaw*, 175 Mass. 59. *In re Swift*, 137 N. Y. 77. *Matter of Curtis*, 142 N. Y. 219. This doctrine furnishes a strong implication that personal property in the decedent's domicil should not be used to relieve property subject to a succession tax under the ancillary administration of another State by discharging liens upon it for the purpose of increasing this succession tax. The tax is to be estimated in reference to the property that is within the jurisdiction of the Commonwealth at the time of the testator's death. *Callahan* v. *Woodbridge*, 171 Mass. 595. *Greves* v. *Shaw*, 173 Mass. 205. *Moody* v. *Shaw*, 173 Mass. 375.

The precise point before us has been decided in New York adversely to the contention of the Attorney General, although, under the laws of that State, the relative rights and obligations of mortgagors and mortgagees are not exactly the same as in Massachusetts. *Matter of Skinner*, 106 App. Div. (N. Y.) 217. *Matter of Sutton*, 3 App. Div. (N. Y.) 208. See also *Matter of Strong*, 17 N. J. Law J. 234.

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In *Kingsbury* v. *Chapin*, 196 Mass. 538, the right of an ancillary administrator to transmit personal property for the payment of debts in the place of the domiciliary administration in the same proportion as the property there is needed and used for a like purpose, is recognized. This is because assets, after paying local debts, may always be transmitted to the domiciliary administrator. They may be used by him for paying debts, or if not needed for that purpose they will be distributed. But so much of them as is needed for the payment of debts does not pass in succession, and cannot properly be taxed. This rule does not suggest the transmission of personal property from the place of original administration for the payment of debts in the place of ancillary administration.

We are of opinion that the amount of the indebtedness under the mortgage is to be subtracted from the value of the real estate, to determine the amount on which the tax should be computed. See *Kingsbury* v. *Chapin*, *ubi supra*.

So ordered.

PATRICK A. McDONNELL, petitioner.

CHRISTIAN FEIGENSPAN *vs.* P. McDONNELL.

Suffolk. December 5, 1907.—February 24, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Rules of Court. Practice, Civil, Motion for new trial. *Words*, "Trial."

The provision of Common Law Rule 45 that "Requests for instructions or for rulings in trials with or without jury shall be made in writing before the closing arguments unless special leave is given to present further requests later," is not applicable to requests for rulings made at a hearing upon a motion for a new trial.

At the hearing upon a motion of the plaintiff in an action at law for a new trial after a verdict for the defendant, the grounds stated in the motion being, first, that the verdict was against the evidence and the weight of evidence and, second, that it was against the law and the rulings of the presiding judge, the defendant asked the presiding judge to rule "that the Superior Court has no power to grant a new trial upon other grounds, after the expiration of the time for filing the same, than those specifically stated in the motion for a new trial." No question as to the pleadings had been raised at the trial. The judge refused

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to grant the request and ordered a new trial, but the ground upon which he ordered it did not appear, although it appeared from the record that during the hearing he questioned counsel as to the propriety of the verdict on the pleadings as they stood. *Held*, that the presiding judge erred in not giving the ruling requested by the defendant.

PETITION to establish exceptions alleged to have been saved by the petitioner, who was the defendant in the case of *Christian Feigenspan* v. *P. McDonnell*, tried in the Superior Court for the county of Suffolk. There had been a verdict for the defendant therein, and the plaintiff had filed a motion for a new trial. The exceptions herein considered were to refusals of the judge to grant requests for rulings made by the defendant at the hearing on the motion for new trial.

There was a hearing on the question of the allowance of the exceptions before *Stevens*, J., before whom the case had been tried, and he ruled: "The within exceptions, being immaterial, frivolous and intended for delay and only partially conformable to the truth, are disallowed." On the filing of the petition in this court, a commissioner was appointed to hear the parties and their evidence, settle the truth of the exceptions and report to the court. Material parts of his report are as follows:

"Upon the hearing on the motion [of the plaintiff for a new trial], the plaintiff was not called upon to argue. After counsel for defendant had argued about an hour, he submitted to the presiding judge in writing nine requests for rulings. . . . Thereafter the hearing was adjourned, and at a subsequent time the defendant's counsel finished his argument and the presiding judge began to render his decision on the motion for a new trial. Whereupon the counsel for defendant handed to him the requests for rulings set forth in his bill of exceptions immediately following the requests heretofore referred to. The presiding judge made no comment or ruling upon either set of requests, and sustained the plaintiff's motion for a new trial without setting forth of record the reasons therefor or the grounds upon which same was granted.

"I find that none of the requests for rulings were given to the presiding judge prior to the beginning of the argument of the motion for a new trial, and, if the latter part of Common Law Rule 45 of the Superior Court, providing that 'requests for in-

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structions or for rulings in trials with or without jury shall be made in writing before the closing arguments unless special leave is given to present further requests later,' applies, no special leave was given by the presiding judge to present the requests after the beginning of the argument. It does not appear that any ruling was made upon the requests or that such ruling was necessary for a proper determination of the question at issue, or that the rights of the petitioner were damaged by failure to give such rulings. It does not appear that the motion was not granted on the ground that the verdict was against the weight of the evidence.

"I find that the judge of the Superior Court properly disallowed the alleged exceptions of the petitioner."

On the coming in of the report of the commissioner, the plaintiff, Christian Feigenspan, moved that the petition be dismissed, and the motion was denied.

Other facts are stated in the opinion.

H. N. Allin, for the petitioner.

J. H. Blanchard, for the respondent.

KNOWLTON, C. J. In this case there was a motion by the plaintiff for a new trial, for the reason, first, that the verdict was against the evidence and the weight of the evidence, and secondly, that it was against the law and the rulings of the presiding judge. At the hearing on this motion the defendant asked the judge to rule, among other things, "that the Superior Court has no power to grant a new trial upon other grounds, after the expiration of the time for filing the same, than those specifically stated in the motion for a new trial." In other requests he presented the same proposition in different forms. The commissioner's report shows that the judge did not give this ruling, and so far as appears, he did not apply the proposition of law in any way. The request was not made before the closing arguments upon the motion, and the judge may have treated it as not deserving of consideration for that reason.

We are of opinion that Rule 45 of the Superior Court, which provides that "requests for instructions or for rulings in trials with or without jury shall be made in writing before the closing arguments unless special leave is given to present further requests later," is not applicable to a hearing of this kind. It

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pertains only to "trials with or without jury," and we think that the word "trial," as here used, means something more than a hearing upon a motion. The rule refers to the closing arguments as a part of the trial, thus implying a proceeding in which there are different recognized stages, like the opening statement on each side, the presentation of evidence and the closing arguments. In the statute referred to in *Commonwealth* v. *Meserve*, 156 Mass. 61, the word is used in a broader sense. Without attempting to define the term in reference to all possible hearings or trials, we are of opinion that a hearing upon a motion for a new trial is not a trial within the meaning of the rule.

The Revision of 1906 of the Rules of the Superior Court, in which Rule 45 appears, did not take effect until July 1 of that year, which was after the hearing in the present case. But on January 9, 1904, Rule 48 of the edition of 1900 was amended by the insertion of the words "or rulings in trials with or without jury," whereby it took the form in which it now appears, numbered differently, in the Revision of 1906.

The ruling requested was a correct statement of the law which was applicable to the hearing. R. L. c. 173, § 112. *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223. The defendant was entitled to have it considered and applied in determining the question before the court.

As the judge failed to grant the request, his decision granting a new trial may have been made under an erroneous rule of law, upon a ground other than those stated in the motion. There is a special reason to fear this, as the bill of exceptions states that, during the argument upon the motion, the judge suggested a question of pleading which, if it had been raised at the trial, might have prevented the defendant from introducing the evidence on which the verdict was founded.

The commissioner's report is brief and informal, but it sufficiently shows that this request for a ruling was made at the hearing upon the motion, that the judge failed to give the ruling, that the case was such as to make the ruling applicable, and that the defendant excepted to the judge's neglect to give the ruling. There were many other requests for rulings, none of which were given. Most of these were erroneous or inappli-

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cable, and we do not deem it necessary to consider them particularly.

Order granting motion for new trial set aside; new hearing granted.

THOMAS ALLEN *vs.* ELIZABETH B. KIDD.

Essex. November 6, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Evidence, Public documents. *Practice, Civil*, Exceptions, Conduct of trial. *Words*, "Public records."

R. L. c. 35, § 5, which states what the words "public records" shall mean in construing the provision of that chapter, does not make the documents therein described public documents.

At the trial of an action of tort in the nature of trespass *quare clausum fregit* in which one question in controversy was as to the width of a certain street in a city, the city engineer of the city in which the street was, called as a witness by the defendant, testified that "it was customary" to keep the note books, in which assistants in his office had made memoranda as to the bounds and courses of streets, as public records. He then was allowed, subject to exception by the plaintiff, to testify as to the contents of such a book, the memoranda in which had been made by one who was living at the time of the trial but who was not called as a witness. In effect, the measurements given from the memoranda were in accordance with those given by surveyors who testified for the plaintiff. *Held*, that, even if the note book were a public document, it was not admissible as evidence of the truth of the facts therein stated; *but* that, the plaintiff not being harmed by the admission of the evidence, the exception should be overruled.

In his charge to the jury in an action of tort in the nature of trespass *quare clausum fregit*, in which the plaintiff contended that the defendant, an owner of adjoining land, had built about twelve inches over the line upon the plaintiff's land, and in which the great preponderance of the evidence was in the plaintiff's favor, the presiding judge, after commenting unfavorably upon actions of such a nature, stated "I suggested to counsel yesterday, in the interest of public trials in the courts, and in the interests of the parties, that perhaps they would agree that, if the defendant were over the line, and the jury so found, you should assess all the damages by him for the value of the land and all the plaintiff has to suffer in consequence of it now and for all time, and have it once for all settled. The defendant's counsel said he was willing to do that, and the plaintiff's counsel said no, and he had a right to say no, because his client would not agree to it; and whether he was stubborn or not is none of our business; he had the constitutional right to do just what he was doing, and it is our duty, whether we think it is proper or not, to give him a fair and impartial trial"; and, at the end of the charge stated, "Whether this is a suit, as it is said, for spite, or whether it is an unwise

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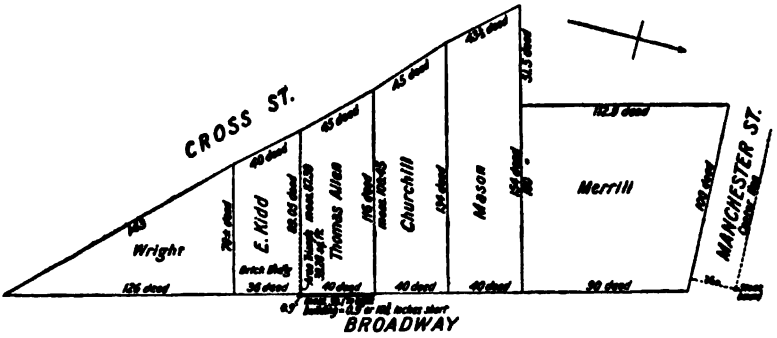
suit or not, you must take it and decide it. The plaintiff has a right to be here; he has a right to claim his inch of land if he has it, and the defendant has a right to come here and defend; and it is your duty to sit down, and decide this question as best you can between them, and do justice in the case." At the conclusion of the charge, the plaintiff called the attention of the judge to the foregoing passages, but he refused to change the charge, stating that what he had already said as to the plaintiff's standing upon his rights ought not to affect them, "because he had a right to do just as he did." *Held*, that the presiding judge erred in incorporating into his charge facts which were not in evidence and did not affect the merits of the case, and which, if they had been offered in evidence, should have been excluded, and were likely to and probably did distract the attention of the jury from the consideration of the true merits of the issue.

LORING, J. This is an action of tort for a trespass *quare clausum fregit*, in which the defendant had a verdict, and the case is here on exceptions taken by the plaintiff.

The plaintiff and the defendant were the owners of adjoining lots, as shown on the accompanying plan.



The width of the defendant's lot was forty-one feet in place of the thirty-six feet shown on the plan, five feet of the Wright lot having been bought by her after she bought the Kidd lot thirty-six feet wide, shown on the plan.

The plaintiff's contention was that the defendant's building on Broadway was north of the division line between the two lots; that the building was one inch wider than the defendant's lot and covered ten and three fourths to twelve inches of the plaintiff's land on the Broadway end of the building; and that, when the building reached Cross Street, the northerly corner of the building was on the division line or slightly within it.

Two engineers testified on behalf of the plaintiff that the defendant's building was over the division line. One said that it

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was ten and three fourths inches over and the other that it was twelve inches over. The first measured from Manchester Street and checked the result so obtained by the fences he found on the ground. The other got his result from the fences and checked it by measurements from Manchester Street.

The plans of both engineers show a stone bound fixing the centre line of Manchester Street. The stone was put in in 1875, eight years after deeds of the several lots shown on the plan were made by the original owner of the whole tract.

One of the defences set up by the defendant was that the side lines of Manchester Street could not be ascertained with precision. Manchester Street was conceded to be an ancient way, in existence before Lawrence became a city.

The defendant was allowed against the plaintiff's exception to prove by the present city engineer of the city of Lawrence what the note book of one Hatch showed as to the placing of the stone bound in the centre of Manchester Street in 1875. Hatch was an assistant engineer in the city engineer's office at that time, and it appeared that both he and one Coolidge, who was city engineer at that time, were living. Neither was called as a witness.

The present city engineer testified "that it is customary to keep all records of that nature in the city engineer's office as public records; that the plans made from these minutes are also kept as part of the records of the engineer's office, but that all the records taken on the street are not put on the plans because they encumber them too much." He was then allowed to testify in answer to the question, "How was the centre line of Manchester Street determined." "I found on the notes there was a measurement of twenty-five feet taken from the northwesterly corner of Manchester and Washington Streets. At that point there is an angle in the street, and I found by calculations from angles and measurements given at the corner of Broadway and Manchester Street . . . — from these notes, — that the centre line as laid out from the ground was undoubtedly measured from the fence line, I found that by calculation from the northwest corner of Broadway and Manchester Street, the distance is 25.6 feet from the fence line, and from the southwesterly corner the calculation is 25.3 feet making a total distance between the

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fence lines across Manchester Street, on the westerly line of Broadway, 50.9 feet."

1. We are of opinion that this evidence was wrongly admitted. But we are also of opinion that the plaintiff was not harmed by its admission.

The defendant's contention is that the note book in question is made a public document by R. L. c. 35, § 5, and was admissible as a public document.

But R. L. c. 35, § 5, does not make the documents therein described public documents. All that that act does is to provide that "in construing the provisions of this chapter and other statutes, the words 'public records' shall" include the documents there described.

In the second place, if Hatch's note book was a public document it was not admissible. There is no rule of evidence which makes public documents competent evidence of the truth of the facts therein stated. The note book in question was used as testifying to the facts therein set forth just as Hatch (who was alive) would have testified to those facts had he been put upon the stand.

The defendant has sought to overcome this difficulty by citing *Gurney* v. *Howe*, 9 Gray, 404. That case decided that an official record of a fact which it is the duty of a public officer to perform and record can be introduced in evidence as testimony of the truth of the facts therein stated. To the same effect see *Kennedy* v. *Doyle*, 10 Allen, 161, 163; *Pells* v. *Webquish*, 129 Mass. 469. But we know of no law which makes it the official duty of a city engineer to fix on the ground the side lines of all or of such city streets as he thinks wise, and to make a record of the line so fixed.

The plaintiff however was not harmed by the admission of this evidence. It confirmed the accuracy of the plans of the plaintiff's engineers. It did not disprove or tend to disprove them in any particular. Manchester Street is shown on the plaintiff's plans to be fifty feet wide. If it was, it would necessarily measure more between the fences on the side lines of Broadway which intersects it at a greater angle than a right angle, and from these plans it would appear to be about fifty and nine tenths inches between the fences on the angle in question.

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2. We are of opinion that the exception which was taken to the charge of the presiding judge must be sustained.

The presiding judge began his charge by a reference to some litigation between two farmers as to a division line where the land was of little or no value, but the farmers had been ruined by paying lawyers to try the case. He added that the farmers had their constitutional rights. He then went on to say that the action before them was an action of trespass, and that if the jury found for the plaintiff "he may keep bringing actions of trespass from now as long as he pleases, covering one day or six months, continuously; that is his right under the law. I perhaps exceeded my judicial authority, but I suggested to counsel yesterday, in the interest of public trials in the courts, and in the interests of the parties, that perhaps they would agree, — make a written stipulation that the defendant, if he were over the line, and the jury so found, that you should assess all the damages by him for the value of the land and all the plaintiff has to suffer in consequence of it now and for all time, and have it once for all settled. The defendant's counsel said he was willing to do that, and the plaintiff's counsel said no, and they had a right to say no, because his client would not agree to it; and whether he was stubborn or not is none of our business; he had the constitutional right to do just what he was doing, and it is our duty whether we think it proper or not, to give him a fair and impartial trial."

Toward the end of his charge the presiding judge came back to this same matter. After stating that the plaintiff was entitled to damages for six years next before the date of the writ, he went on to say: "Well, if you adopt the other course, as was suggested, to wit, to assess damages for all time, why you can say what six inches of land, or one inch or a foot, or whatever it may be, — how much damage it was for the plaintiff for taking it, for all time. But, as I say, the plaintiff has a perfect right to have that issue tried, you may say how much the damage is between the dates I have stated. I cannot help you on that; you have heard the property described, and you have heard the arguments. I suppose the plaintiff intends to settle in this suit, if he can, if there is a trespass, and the amount of damages he does not care about. Of course, if it is established that there is

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a trespass, then the defendant has either to take down his building so far as it overlaps, or he has to pay continual damages, and the plaintiff has a right to take that position and make that claim. Well, gentlemen, whether this is a suit, as it is said, for spite, or whether it is an unwise suit or not, you must take it and decide it. The plaintiff has a right to be here; he has a right to claim his inch of land if he has it, and the defendant has a right to come here and defend; and it is your duty to sit down and decide this question as best you can between them, and do justice in the case."

At the conclusion of the charge the plaintiff excepted *inter alia* "to that part in the court's charge where he alluded to and informed the jury of the efforts of the court to make the parties agree to a compromise." *

The presiding judge did not, in our opinion, exceed his judicial authority in suggesting to the parties that they should let the jury assess the damages suffered by the plaintiff if the defendant's building was erected in part on his land. It is not beyond the judicial proprieties for a judge in a proper case to seek to end litigation by suggesting action which the law does not call for.

But we are of opinion that the presiding judge did exceed his judicial authority when he stated to the jury (1) the suggestion which he had made to counsel, and (2) the fact that the plaintiff had refused to accede to it; particularly when his subsequent reference to this refusal of the plaintiff might have been construed by the jury to be an intimation by him that in his opinion the plaintiff was or might be thought to be "stubborn," and the action brought by him and then to be decided by the jury was or might be thought to be brought "for spite."

By telling the jury of the suggestion he had made of an agreement settling the damages for all time in the future and of the

* After the plaintiff had excepted as set forth in the opinion, the presiding judge stated to the jury: "Plaintiff's counsel . . . asks me . . . to save an exception because I said to you in the discharge of my duty I tried to make the parties agree to submit this issue once for all. I decline to take back that statement, but I have already said to you that it must not affect the rights of the plaintiff without regard to whether he would settle or whether he would consent to have it all tried together, and I told you he had a right to stand on his right, and therefore what I said about that should not affect you, because he did have a right to do just as he did."

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plaintiff's refusal to accede to it, the presiding judge thrust into the case a fact not affecting the merits of the issue which the jury were to decide. Further than that, it was a fact likely to appeal to the sympathy of the jury and so to distract them from a consideration of the true merits of the issue. To this must be added the subsequent reference made by the presiding judge to the plaintiff's refusal which (as we have said) might be understood to be an intimation that the plaintiff was stubborn and was pressing his action out of spite.

In *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444, the defendant asked to have a verdict set aside because the "tone of the charge was unfavorable to the plaintiff." In dealing with this request the court said: "But this is a matter not to be revised on a bill of exceptions, unless some rule of law was incorrectly stated, or unless the charge violated the statute which provides that the courts shall not charge juries with respect to matters of fact, Pub. Sts. c. 153, § 5, or unless it is apparent that the attention of the jury was so far diverted from the true questions of the case as to amount to a mistrial and a failure of justice"; and that case was disposed of on the ground that "The attention of the jury was not diverted from the true questions of the case, but was very pointedly called to those questions, and we are unable to see that the result of the trial shows any failure of justice." *Beal* v. *Lowell & Dracut Street Railway*, *ubi supra*, was cited with approval in *Bishop* v. *Journal Newspaper Co.* 168 Mass. 327, 332.

The case at bar is a much stronger case than *Beal* v. *Lowell & Dracut Street Railway*, *ubi supra*. In the first place, in the case at bar a fact was interjected into the case by the presiding judge, and in the second place, the matter now complained of was brought to his attention at the conclusion of his charge. Had the fact interjected into the case in the action now before us been admitted in evidence by the judge during the progress of the trial under the objection and exception of the plaintiff, there would be now no question of his right to a new trial. We cannot see why the plaintiff in the case at bar was less harmed by what took place than he would have been under those circumstances.

If, however, the plaintiff must go farther and bring himself within the rule laid down in *Beal* v. *Lowell & Dracut Street*

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Railway, ubi supra, we are of opinion that he has done so. The great preponderance of the evidence was in his favor. That is enough.

Exceptions sustained.

W. Coulson, (*D. J. Murphy* with him,) for the plaintiff.

H. R. Dow, for the defendant.

SAMUEL R. GORDON *vs.* MAX LEVINE.

Suffolk. November 12, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Bills and Notes. Lord's Day. Payment.

A check on a bank delivered on Sunday by the drawer to the payee in payment of a debt contracted by the drawer on a secular day and accepted by the payee as such payment is invalid and of no effect in the hands of the payee; but, if the payee receives payment of the check from the bank or value for it from one to whom he negotiates it, he cannot again collect the debt from the drawer.

If the drawer of a check upon a bank delivers it to the payee on Sunday and the payee on a secular day negotiates it by indorsement for value to one who has no notice of the fact that it was delivered to the payee on Sunday, the check thereby becomes a valid check in the hands of the indorsee.

At the trial of an action of contract for money alleged to have been lent to the defendant by the plaintiff, it appeared that the money was lent as alleged on a secular day, that the defendant, who was of Boston, drew a check dated on a Saturday upon a Boston bank payable to the plaintiff, and on Sunday delivered it to the plaintiff, who was of Chelsea, in payment of the debt, and that the defendant accepted it as such payment and negotiated it on Monday to one from whom he received its full face value. No presentment of the check was made until Friday at a time after the bank upon which it was drawn had failed, it having failed on that day. The plaintiff thereupon returned to the person to whom he had negotiated the check the money he had received therefor. From the time when the check was drawn to the time when the bank failed, there were funds of the defendant in the bank sufficient to pay it. The plaintiff requested the presiding judge to rule, "If the check was delivered on Sunday, it was invalid and of no legal effect, and the plaintiff is entitled to recover on his count for money lent." The presiding judge refused to rule as requested and found for the defendant, and the plaintiff excepted. *Held*, that, since the presiding judge might have found either that the plaintiff had received the amount called for by the check, or that he might have received it but for his own neglect, he was not bound to give the ruling requested.

CONTRACT in three counts, the first count being for $100 loaned to the defendant by the plaintiff with interest from

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January 1, 1906, and the second and third counts being upon a check drawn upon the Provident Securities and Banking Company. Writ in the Municipal Court for the City of Boston dated January 29, 1906.

On appeal to the Superior Court, the case was tried before *Sanderson*, J., without a jury. From his findings, it appears that the following were the facts: In consideration of a valid debt of $100 contracted on a secular day, the defendant delivered to the plaintiff on Sunday, December 31, 1905, a check dated December 30, 1905, for $100 drawn on the Provident Securities and Banking Company and payable to the plaintiff, and the plaintiff accepted it in payment of the debt. The defendant and the bank upon which the check was drawn were of Boston, and the plaintiff of Chelsea. The plaintiff negotiated said check on Monday, January 1, 1906, and it bore, besides the indorsement of the plaintiff, those of one Benjamin Saievetz and of B. Rutstein and Son, and of Faneuil Hall National Bank. It was deposited for collection on January 4, 1906, in the Faneuil Hall National Bank, of Boston, whose messenger went with it on Friday, January 5, 1906, to the Provident Securities and Banking Company, and found its doors closed, the bank having failed on that day. No previous presentment had been made. From the time when the check was drawn to the time when the bank failed there were funds in the bank sufficient to pay it. The check was returned in due course to the plaintiff who returned the $100 which he had received upon the negotiation of said check. There had been no other payment of the indebtedness of the defendant to the plaintiff except by the delivery of the check.

The presiding judge, besides refusing to give the ruling requested by the plaintiff and set out in the opinion, ruled, at the request of the defendant, "That a check must be presented for payment within a reasonable time after its issue, and that in order to have been presented within a reasonable time the check in suit should have been presented before close of the banking hour on the next secular day after delivery (either Monday, January 1, or the latest on Tuesday, January 2). That its transfer to successive holders would not extend the time for presentment, and the presentment on Friday, January 5, would not be within a reasonable time, and if the bank failed in the

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meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent."

There was a finding for the defendant, and the plaintiff alleged exceptions.

F. P. Garland, for the plaintiff.

N. Barnett, for the defendant.

LORING, J. The only question before us in the case at bar is that raised by an exception to the refusal to give the following ruling asked for by the plaintiff: "If the check was delivered on Sunday it was invalid and had no legal effect, and the plaintiff is entitled to recover on his count for money" lent.

It is true that, "if the check was delivered on Sunday, it was invalid and had no legal effect," and that the plaintiff could not have recovered if he had brought suit on it against the defendant on non-payment by the bank after a presentment within the proper time. *Stevens* v. *Wood*, 127 Mass. 123.

But it does not follow that "the plaintiff is entitled to recover on his count for money" lent.

A defence to the count for money lent would have been made out if the plaintiff had received the $100 from the bank on presenting the check to it for payment.

It was decided in *Johnson* v. *Willis*, 7 Gray, 164, that a payment made on Sunday is a defence to an action for the recovery of the debt so paid. To the same effect see *Cranson* v. *Goss*, 107 Mass. 439, 441; *Leonard* v. *Travis*, 6 Allen, 129, 130; *Clapp* v. *Hale*, 112 Mass. 368, 370.

In the case we have supposed, where the plaintiff received his $100 from the bank on presenting the check for payment, it is true that the defendant could not make out his defence without showing an infraction of the Sunday law. But that is equally true where the debt is paid on Sunday in cash. As was said by Metcalf, J., in *Leonard* v. *Travis*, 6 Allen, 129, 130: "A debtor violates the law by paying the debt on Sunday. So does the creditor by receiving it on that day; but he cannot enforce a second payment. *Johnson* v. *Willis*, 7 Gray, 164."

The distinction established by the cases in this Commonwealth is this: The court will not aid a party to recover on a Sunday transaction on the one hand; but on the other hand it will not

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treat as a nullity what was done on Sunday in performance of a valid contract; it will give to the act done on Sunday its legal effect when set up in defence.

This is made clear by the language of the opinions in *Johnson* v. *Willis*, 7 Gray, 164, *Cranson* v. *Goss*, 107 Mass. 439, 441, and *Leonard* v. *Travis*, 6 Allen, 129, 130, and it is established by the decision in *Clapp* v. *Hale*, 112 Mass. 368. In that case it was decided that while a part payment on Sunday was effectual as payment *pro tanto* it did not take the note out of the operation of the statute of limitations.

To come to the case at bar the plaintiff in fact got his $100 by "negotiating" the check, and the result is the same as if he had received the money from the bank.

It appears from the bill of exceptions that when he "negotiated" the check on Monday he received from the indorsee the $100 called for by it. It is stated that when the check was returned to the plaintiff he "returned the $100 which he had received upon the negotiation of said check." But that fact is of no consequence.

The check was a valid check in the hands of the purchaser to whom it was negotiated on Monday. A negotiable instrument void because delivered on Sunday is valid in the hands of a *bona fide* purchaser for value without notice. *Cranson* v. *Goss*, 107 Mass. 439. The statute (as to the rights of a purchaser of a negotiable instrument payable on demand) in force when *Stevens* v. *Wood*, 127 Mass. 123, was decided, was repealed by the negotiable instruments act, now R. L. c. 73, § 70.

The purchaser of this check from the plaintiff lost his rights against the plaintiff (the payee who indorsed it to him) when he failed to present it within a reasonable time, for the same reason that he lost them against the drawer; as to which see *Gordon* v. *Levine*, 194 Mass. 418. It follows that the repayment of the $100 on the check being "returned in due course," was a voluntary payment which the plaintiff was not bound to make.

Further, if the plaintiff, in place of negotiating the check, had kept it until it was presented on Friday, when it was too late, (see *Gordon* v. *Levine*, 194 Mass. 418,) and (because it was presented too late) the check was not paid and the money was lost, the result would have been the same. In that case he

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could have had his money had he presented the check within the proper time; and since in that case the money was lost through his neglect in not presenting the check within a reasonable time, he cannot stand in a better position than he would have stood in had he acted with due promptness.

The only apparent explanation for the plaintiff's returning the $100 on the return of the check was that in spite of the facts stated above the check was not "negotiated" to a *bona fide* purchaser, but was "negotiated" to his own agent. If it was, the neglect to present the check within a reasonable time was the plaintiff's own neglect.

Since the judge in the case at bar may have found (1) that the plaintiff received the $100 called for by the check, or (2) that he might have received it but for his own neglect, he was not bound to give the ruling asked for. See in that connection *Swett* v. *Southworth*, 125 Mass. 417; *Whitney* v. *Esson*, 99 Mass. 308. The entry must be

Exceptions overruled.

LEOMINSTER GAS LIGHT COMPANY *vs.* MARTIN C. HILLERY & another.

Suffolk. December 2, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Landlord and Tenant. Covenant.

If a deed of land is made subject expressly to a lease for five years, and the lease contains a covenant for its renewal for an additional term of five years but is not recorded, the grantee in the deed is bound by the covenant to renew, which runs with the land, and it is immaterial whether or not he had actual notice of the covenant before taking his deed.

A covenant to renew a lease of land runs with the land.

A lease of land for five years, containing a covenant for the renewal of the lease for an additional term of five years, is a lease for more than seven years within the meaning of R. L. c. 127, § 4, providing for the recording of such a lease, and, if recorded under that section, gives the lessee, upon his election to take a renewal of the lease according to its terms, the rights of a lessee for ten years.

Whether a grantee of land under a deed made subject expressly to a lease for five years, which contains a covenant for its renewal for an additional term of five years but is not recorded, if he had the lease in his possession for a considerable time before his purchase of the land without reading the covenant for a

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renewal or supposing that the lease contained such a covenant, has had actual notice of the covenant, here was left undecided, as the grantee was bound by the covenant without actual notice of it.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 8, 1907, to enforce the specific performance of a covenant of renewal in a certain lease as described in the opinion.

The case came on to be heard before *Rugg*, J., who made certain findings of fact, and reserved the case upon such findings for determination by the full court. If the plaintiff was entitled to any relief, a decree was to be entered in its favor in such form as might be approved by a single justice; if it was not entitled to relief, the bill was to be dismissed.

H. W. Ogden, for the plaintiff.

C. F. Baker, for the defendants.

KNOWLTON, C. J. The plaintiff is the holder of real estate under a lease for the term of five years from the first of February, 1902, containing a covenant of the lessor for a renewal of the lease, upon the same terms and conditions and for the same rental, for the further term of five years from the first day of February, 1907. On August 6, 1903, the lessor conveyed the property to the defendant Hillery, who is hereinafter called the defendant, subject to the lease. On the sixth day of February, 1907, the defendant gave the plaintiff notice to vacate the premises, stating that the lease had expired. Previously, on the twenty-fifth day of August, 1906, and again on November 14, 1906, the plaintiff notified the defendant in writing that it desired an extension of the lease according to its terms. This bill is brought to obtain an injunction restraining the defendant from ejecting the plaintiff from the premises so long as it complies with the provisions of the lease, and a decree ordering the defendant to execute to the plaintiff a renewal of the lease.

This was a lease for more than seven years, within the meaning of the R. L. c. 127, § 4, and, if it had been recorded under that section, it would have given the plaintiff the rights of a lessee for ten years on his election to take a renewal of the lease according to its terms. *Toupin* v. *Peabody*, 162 Mass. 473. *Kimball* v. *Cross*, 136 Mass. 300. *Kramer* v. *Cook*, 7 Gray, 550. *Stone* v. *St. Louis Stamping Co.* 155 Mass. 267. *De Friest* v. *Bradley*, 192 Mass. 346, 351.

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The covenant in the lease providing for an extension of the term was a covenant running with the land, and was an important part of the lease. *Cunningham* v. *Pattee*, 99 Mass. 248, 251. *Howland* v. *Coffin*, 12 Pick. 125. *Sanders* v. *Partridge*, 108 Mass. 556. *Patten* v. *Deshon*, 1 Gray, 325.

The description of the premises by metes and bounds, in the deed to the defendant, is followed by a statement of certain rights of way in third persons, and then by these words: "Said premises are sold subject to a mortgage of sixteen thousand five hundred dollars to the Leominster Savings Bank, and interest thereon from July 21, 1903, also a lease of part of the premises to the Leominster Gas Light Company, and a lease of a part of the premises to H. H. Bicknell and Company." As to that part of the premises included in the plaintiff's lease, the conveyance was only of the reversion after the expiration of the lease. As against the lease, including all rights secured by covenants running with the land, the defendant took nothing. All his rights under the deed are subject to the lease, and are subordinate to the plaintiff's rights under the lease. As the reversioner, he is bound by this covenant to renew the lease. See *Cook* v. *Farrington*, 10 Gray, 70; *Fitzgerald* v. *Libby*, 142 Mass. 235; *Butterick, petitioner*, 185 Mass. 107, 111.

In this view of the case we have no occasion to inquire whether, apart from the limitation of the defendant's title, the findings show that he had actual notice of the lease according to its true legal effect, within the meaning of the R. L. c. 127, § 4. See *Pomroy* v. *Stevens*, 11 Met. 244; *Lawrence* v. *Stratton*, 6 Cush. 163; *Lamb* v. *Pierce*, 113 Mass. 72; *Toupin* v. *Peabody*, *ubi supra*; *George* v. *Kent*, 7 Allen, 16; *White* v. *Foster*, 102 Mass. 375. He knew of the lease, which was called a lease for five years, and he had it in his possession for a considerable time before his purchase of the property, without reading the covenant for a renewal, or supposing that it contained such a covenant. The plaintiff contends that this constituted actual notice of the covenant; but we leave this question undecided.

Because the defendant's title under his deed is, in terms, made subject to the lease, with all its provisions, there must be a

Decree for the plaintiff.

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ALFRED W. PUTNAM, trustee, *vs.* ARRABELLA K. SOUTHWORTH & another.

Suffolk. December 2, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, & RUGG, JJ.

Bankruptcy. Fraudulent Conveyance. Mortgage. Trust.

In a suit in equity by a trustee in bankruptcy against the wife and the father of the bankrupt, to recover certain real estate conveyed by the bankrupt, about eleven months before his adjudication in bankruptcy, through a third person to his wife and mortgaged by her to the father of the bankrupt about two weeks before that adjudication, the judge who heard the case found that the conveyance was made by the bankrupt to his wife when he was insolvent with the intent on his part to hinder, delay and defraud his creditors, that the conveyance was a voluntary one without consideration, and that the mortgage by the wife to the father, purporting to secure the payment of a certain sum of money, also was made voluntarily either because the father held an unpaid debt against the bankrupt or for some other reason. The mortgage was not recorded until two days after the adjudication in bankruptcy. The judge found that the mortgagee did not participate in the bankrupt's fraud and acted in good faith. *Held*, that the deed to the wife being intended by the grantor to defraud his creditors and being without consideration was voidable by his creditors when it was made and by the trustee in bankruptcy after his appointment, and that under R. L. c. 127, § 4, as the mortgage was not recorded at the time of the adjudication in bankruptcy, the land "might have been levied upon and sold under judicial process" by the bankrupt's creditors as having been conveyed to his wife in fraud of creditors, and so under § 70 a, 5, of the bankruptcy act of 1898 it passed to the trustee in bankruptcy upon his appointment.

The holder of an unrecorded mortgage of land cannot claim the land as against the trustee in bankruptcy of the mortgagor on the ground that the mortgage creates a trust, for, if it does, an unrecorded trust concerning land, under R. L. c. 147, §§ 1–8, is of no more effect than an unrecorded mortgage.

KNOWLTON, C. J. This is a bill in equity brought by a trustee in bankruptcy to recover certain real estate which formerly belonged to the bankrupt and which was conveyed by him through a third person to his wife, one of the defendants, and by her mortgaged to the bankrupt's father, the other defendant. The judge has found that the conveyance from the bankrupt to his wife was made with the intent on his part to hinder, delay and defraud his creditors, and that he was then insolvent. The first question is whether the plaintiff is entitled to relief as against the wife. If she participated in the fraud, or if the

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conveyance was voluntary, the trustee, representing the creditors, may have the conveyance set aside.

Under the bankruptcy act of 1898, § 70 a, 4, the trustee is vested by operation of law with the title of the bankrupt to all "property transferred by him in fraud of his creditors," and by § 70 a, 5, to all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." In reference to all such property, the trustee has the same rights as an attaching creditor. The cases which assert that the trustee takes no better title than that of the bankrupt have reference only to rights "unaffected by fraud," and they except conveyances "void by some positive provision of the act." *Thompson* v. *Fairbanks*, 196 U. S. 516, 526.

The judge, who has reported "all the material facts," has made no express finding in regard to the wife's knowledge of her husband's fraudulent purpose, although, from her relations to him, and from the fact that the conveyances were not recorded for about eight months, and from other facts in the case, it might be inferred that she knew it and attempted to aid him in it. These conveyances were made on October 28, 1905, and the judge has found expressly that she "paid no consideration for the land, otherwise than that on September 22, 1906, Arrabella K. Southworth made a mortgage of this land for three thousand dollars in the usual form to William S. Southworth [the other defendant], and left it with her attorney to be recorded, but it was not recorded until October 10, 1906, two days after the adjudication of William B. Southworth in bankruptcy. William B. Southworth did not join in said mortgage." Under these findings it is plain that this was a voluntary conveyance to the wife, voidable by the husband's creditors all the time between October 28, 1905, and September 28, 1906, when this mortgage was made. There are no findings that show any change in the legal relations of the husband and wife to the property after the deed to her was made and delivered. It does not appear that there was any contract or arrangement between them in regard to the making of this mortgage, even if it were possible for a husband and wife legally to contract with each other. So far as appears, she voluntarily made the

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mortgage to her father in law, either because he held an unpaid debt against her husband or for some other reason. Upon these findings the deed from her husband continued to be, as it was in the beginning, a conveyance made without consideration, with the intent on his part to hinder, delay and defraud his creditors. It was, therefore, voidable, both at that time and by his trustee in bankruptcy afterwards.

Upon the findings the agreement in writing between the bankrupt and his father, when the bankrupt acquired the title to this land, six months before he conveyed it to his wife, does not affect the title of his wife or the rights of his creditors. The same may be said of the agreement in writing between the two defendants, the bankrupt's wife and his father, made on the day of his conveyance to his wife, October 28, 1905. The findings show that the latter agreement did not enter into the transaction between the husband and his wife, whereby the property passed from him to her, and it did not affect her title. Neither of these agreements was recorded, nor produced at the hearing, and each of them was said to be lost.

The remaining question, which is reported as "*the* question in the case," is whether the mortgage is invalid as against the plaintiff because it was not recorded until after the adjudication in bankruptcy. The judge has found that the mortgagee did not participate in the bankrupt's fraud, but acted in good faith. As a *bona fide* holder for value, he took a good title, notwithstanding that the title of the mortgagor was voidable as against the creditors of her grantor. If his mortgage had been recorded before the adjudication in bankruptcy plainly it would have been good against the trustee.

But under the R. L. c. 127, § 4, a conveyance of real estate is not valid as against any one except the grantor and his heirs, devisees and those having actual notice of it, unless it is duly recorded in the registry of deeds. Under § 70 a, 5, from which we have quoted, as this land "might have been levied upon and sold under judicial process" by the bankrupt's creditors, as having been conveyed to his wife in fraud of the creditors, it passed to the trustee under the appointment. The failure to record the mortgage before the rights of creditors had attached through the adjudication in bankruptcy in their favor left the

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property as it would have been if attached on mesne process before the mortgage was recorded. The statute expressly provides that "claims which for want of record or for other reasons would not have been valid liens against the claims of the creditors of the bankrupt shall not be liens against his estate." Section 67 a. Section 67 d preserves only liens, otherwise valid, "which have been recorded according to law if record thereof was necessary in order to impart notice." The property was, therefore, subject to be applied in payment of the bankrupt's debts. *Humphrey* v. *Tatman*, 198 U. S. 91. *In re Lukens*, 138 Fed. Rep. 188. *Haskell* v. *Merrill*, 179 Mass. 120. *Clark* v. *Williams*, 190 Mass. 219.

It is contended that the unrecorded agreements in writing, already referred to, subjected the land to a trust of which the mortgagee can avail himself against the trustee in bankruptcy. It does not appear that either of them was in such a form as to constitute a trust, or that it was intended to create a trust. If either of them was so intended, the failure to record it leaves the mortgagee unable to enforce it as against the trustee, for the same reason that he is unable to enforce his mortgage. R. L. c. 147, §§ 1–3.

Decree for the plaintiff.

J. Everett, for the defendants.

A. W. Putnam, pro se, submitted a brief.

HARVEY L. THOMPSON, executor, *vs.* AUGUSTA THORNTON.

Middlesex. December 2, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Devise and Legacy. Words, "Relatives," "In equal shares."

Where a fund is left by will to trustees to be used and expended for the comfortable support and maintenance of the testator's son during his life, and after his death to pay the residue, "if any thereof shall be left," to certain persons, and the testator's son dies before him, this does not cause the legacy in remainder to lapse, on the ground that the contingency on which it was to take effect

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never can happen, but on the contrary it becomes operative at once upon the death of the testator, and the estate which passes is not affected by the fact, that had the son lived the trust by its terms could have been so administered as to leave no remainder.

A testator left a fund to trustees for the comfortable support and maintenance of his son during his life, "and at his decease to pay and distribute, after paying their expenses of said trusteeship, the residue of my estate, if any thereof shall be left, in equal shares to my relatives, by right of representation under the statutes of this Commonwealth." *Held*, that the word "relatives" had its ordinary meaning in a will, designating those persons who would take under the statute of distributions, that its meaning was not changed by the words "in equal shares," which in connection with the words "by right of representation" meant equal shares as given by the statute referred to, and that, under the rule relating to persons who are given by will the same estate which they would take in case of intestacy, the persons designated as relatives took the fund as next of kin of the testator by virtue of the statute.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on December 6, 1906, by the executor of the will of Isaac H. Burditt, for instructions.

In the Probate Court the case was submitted to *McIntire*, J., upon an agreed statement of facts. He made a decree ordering that the funds in the hands of the executor, amounting to $8,378.91, be distributed among certain persons named in the proportions there stated, as being the relatives of the deceased by right of representation under the statutes of this Commonwealth. Augusta Thornton, one of the respondents, appealed, stating, as her objection to the decree, that she was a niece of the testator and a legatee under his will, and that the distribution made by the decree gave her only one fourteenth part of the fund whereas she claimed one third of it. The distributees were twelve nephews and nieces of the testator and the issue of two other deceased nieces, all being the issue of two deceased sisters and a deceased brother of the testator. The appellant was the only child of one of the deceased sisters.

The appeal came on to be heard before *Morton*, J., who, at the request of the parties, reserved and reported the case upon the petition, the reasons of appeal, the decree of the Probate Court and the agreed statement of facts for determination by the full court, such order to be made as justice might require.

The case was submitted on briefs.

F. E. Austin, for the respondent.

H. L. Boutwell & W. H. Hastings, for the petitioner.

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RUGG, J. The question to be determined is the distribution of the residuary estate of Isaac H. Burditt, who died in April, 1903, at the age of seventy-nine years. The next of kin are twelve nephews and nieces and seven grandnephews and nieces, the issue of the two deceased nieces, all being the descendants of one brother and two sisters of the testator. His son, Isaac F., mentioned in the will and living at the time it was executed, predeceased the testator. The prefatory clause of the will shows a plain intent to dispose of all his property. The only other clause now material is as follows: "All the rest and residue of my estate real, personal or mixed I bequeath to Charles Emerson Stevens of Marlborough in our County of Middlesex and William B. Batchelder of Boston in our County of Suffolk, both in our Commonwealth of Massachusetts, but in trust to be used and expended by said Trustees for the comfortable support and maintenance (and including funeral expenses) according to their best judgment of my infirm son Isaac Frederick Burditt of said Malden during his life, and at his decease to pay and distribute, after paying their expenses of said Trusteeship, the residue of my estate, if any thereof shall be left, in equal shares to my relatives, by right of representation under the Statutes of this Commonwealth."

The first point argued is that this bequest to relatives is contingent upon the happening of the death of Isaac Frederick Burditt and a balance of the trust fund remaining in the hands of the trustee after his death, and that, as Isaac Frederick died during the life of the testator, this contingency can never happen, and the legacy has lapsed. *McGreevy* v. *McGrath*, 152 Mass. 24, decided that when a testamentary provision is so framed as to take effect only upon the happening of a certain event, and it is clear that the designated event can never happen, then the provision cannot be executed. Where one makes a will conditioned to be operative only in the event of the testator's decease during a particular journey, and he has a safe return home, there is then no will. But that principle has no application to the facts here presented. This is the ordinary case of a devise over after the termination of an interest for life. The death of the life tenant before the testator simply accelerates the time when the devise over becomes operative. *Prescott* v. *Prescott*, 7 Met. 141. *Bates*

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v. *Dewson*, 128 Mass. 334. The fact that under the terms of the trust, the estate might be so administered that there would be no remainder makes no difference with the rules of law which govern the interpretation of the will.

The next doubt suggested is as to the meaning of the testator in employing the words, "in equal shares to my relatives, by right of representation under the statutes of this Commonwealth." Although "relatives," as popularly used, is a word of general and comprehensive signification, it has acquired a definite and restricted sense when occurring in wills, and unless a contrary intention appears, it is construed as the equivalent of those persons who would take under the statute of distributions either as next of kin or by representation of next of kin. *Esty* v. *Clark*, 101 Mass. 36. Gardner on Wills, 431. The remaining difficulty of interpretation arises from the words "in equal shares," for without these, the intent would be clear that there should be distribution under the general law. This intention is expressed with emphasis by reference to the statutes of the Commonwealth, to which the testator appeals as the final standard for the distribution of his bounty, and the words, "by right of representation," which is a phrase of the statute of distribution, give added force to this expression. The words "in equal shares" do not manifest a purpose to modify what has been before clearly and aptly expressed, and can be given effect by interpreting them as meaning with such equal regard to the rights of all his heirs at law as the law itself recognizes in the statute of distributions. The cases upon the use of these words are fully reviewed in *Allen* v. *Boardman*, 193 Mass. 284. The intention of the testator was to have his estate distributed, in the event which has occurred, according to the law for the distribution of intestate estates.

Where, however, an heir at law under a will takes the same estate in nature and quality as he would inherit in case of intestacy, he takes the estate by descent and not as devisee. *Ellis* v. *Page*, 7 Cush. 161. *Pierce* v. *Smith*, 13 Allen, 42. It does not distinctly appear from the decree of the Probate Court that the distribution is made according to the terms of the will and not under the statute of distribution, and therefore no modification of it is necessary. The executor can be authorized to dis-

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tribute an estate as intestate. As there are twelve kindred of equal degree, and issue of two other kindred of the same degree, who have deceased, the estate should be divided into fourteen equal parts, the grandnieces and grandnephews to take by right of representation the share of their deceased mothers. R. L. c. 140, § 3, cl. 2; c. 133, § 1, cl. 5. *Balch* v. *Stone*, 149 Mass. 39.

Decree of Probate Court affirmed.

PFISTER AND VOGEL COMPANY *vs.* FITZPATRICK SHOE COMPANY, HENRY FITZPATRICK, petitioner.

Suffolk. December 2, 3, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Landlord and Tenant.

If the owner of a building near a shoe factory orally lets it to a corporation operating the factory to be used in connection with the factory, and refuses to bear any expense of making the necessary changes to adapt it to that use, but gives the tenant to understand that he has no objection to any changes it desires to make at its own expense, whereupon the tenant makes not very extensive alterations of which the owner knows and to which he does not object until after the lapse of four years, the owner cannot maintain a claim to be paid by the corporation, or the receivers of its property, at the end of the four years for putting his building in the same condition that it was at the time of the letting.

PETITION, filed on January 29, 1907, to prove a claim against the receivers of the property of the Fitzpatrick Shoe Company, appointed in the suit of *Pfister & Vogel Company* v. *Fitzpatrick Shoe Company*, pending in the Supreme Judicial Court, asking for damages sufficient to restore to its former condition a two story building in Stoughton owned by the petitioner which had been hired and used by the shoe company in connection with its factory, and afterwards was used for a time by the receivers who paid rent at the rate of $15 a month up to January 15, 1907, when possession of the building was surrendered to the petitioner.

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There was a hearing upon the petition before *Braley*, J., who refused to rule that the petitioner should be allowed to prove his claim, and made the findings stated at the beginning of the opinion. At the request of the petitioner he reported the case to the full court. If the ruling was wrong, by agreement of parties, the petitioner was to be allowed to prove his claim for the sum of $230 with costs; otherwise, his petition was to be dismissed.

O. A. Marden, for the petitioner, Henry Fitzpatrick.

W. O. Underwood, for the receivers.

RUGG, J. This petition for leave to prove a claim was heard before a justice of this court, who found that the alterations, for which the petitioner asks damages, were made with the knowledge and assent of the petitioner, that they were reasonably necessary to adapt the premises to the uses of the defendant tenant as shoe manufacturer, and that the premises have not deteriorated during the occupancy by the wilful or negligent conduct of the lessee. These findings will not be disturbed unless shown to be plainly wrong. The evidence was oral, and the presiding justice saw the witnesses, and had the opportunity to test by his own observation the weight to which each was entitled. Without resting upon this ground, however, the finding appears upon the record to have been fully warranted. It is obvious that the building of the petitioner at the time it was leased was ill adapted for economical use in connection with the defendant's other factory without the making of some changes. There was evidence tending to show a discussion between the landlord and tenant as to these necessary changes, in which the former refused to bear any expense in that connection and gave the tenant to understand that he had no opposition to any changes it desired to make at its own expense. He knew of the alterations at the time they were made, and offered no objection respecting them until the lapse of more than four years. This evidence not only justified but almost compelled a finding that the petitioner agreed to the making of whatever reasonable adaptations of the building to its needs the tenant chose at its own cost. The alterations, although sufficient to constitute waste in the absence of assent from the landlord, were not very extensive nor expensive. Under these circumstances he cannot now ask to have the

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premises put in the same condition as they were at the beginning of the defendant's occupancy.

In accordance with the terms of the report, let the entry be

Petition dismissed.

GEORGE E. NELSON *vs.* GEORGE R. BLINN.

Suffolk. December 3, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Constitutional Law. Absentee. Limitations, Statute of.

The provisions of R. L. c. 144, §§ 10, 11, that, after the property of an absentee has remained in the hands of a receiver appointed in accordance with the provisions of that chapter until fourteen years after the disappearance of the absentee, and within that time the absentee has not appeared and claimed the property, all the right, title and interest of such absentee in the property shall be barred and no action, suit or petition shall be commenced by him for or on account of the property, and that the court shall order the distribution of the unexpended balance of the property to the persons to whom and in the shares and proportions in which it would have been distributed if the absentee had died intestate on the day fourteen years after the date of his disappearance, are constitutional, this being a statute of limitation which the court cannot say is unreasonable.

KNOWLTON, C. J. The appellant was appointed the receiver of the estate of an absentee from the Commonwealth, under the R. L. c. 144, as amended by the St. 1904, c. 206. After due proceedings in the management and settlement of the estate of the absentee, more than fourteen years having elapsed since the time of her disappearance as found and recorded by the court, a petition for distribution of the estate was filed in the Probate Court, and after proper notice and regular proceedings a decree was made ordering a distribution in accordance with the prayer of the petition. The case is before us on an appeal, and the only question raised is whether the statute referred to is constitutional.

The appellant relies upon art. 10 of the Declaration of Rights, which guarantees to every individual protection in the enjoyment of his life, liberty and property, and upon the Fourteenth Amendment to the Constitution of the United States, which

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declares that no State shall deprive any person of life, liberty or property without due process of law. As applied to a case like the present, the prohibition in the amendment just referred to is as broad as the general provision in the Constitution of Massachusetts.

The unanimous opinion of the justices of the Supreme Court of the United States upon a similar statute, in the case of *Cunnius* v. *Reading School District*, 198 U. S. 458, may be treated as a sufficient authority, except so far as the different provisions of the statutes modify the questions involved. That case arose upon a statute of Pennsylvania, whose constitutionality was sustained by a unanimous decision of the Supreme Court of that State, reported in 206 Penn. St. 469. In each decision a distinction was pointed out between those statutes which authorize a settlement of the estate of a deceased person, under which the proceedings are void and the whole jurisdiction gone if the person is in fact alive, and statutes like the present, in which a State undertakes to deal with property within its jurisdiction when its owner has abandoned it, or for some other reason cannot be found. Said Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in the case just cited, "It is a wise and just statute of sequestration and conservation of property which is without a known owner, whether the late owner has abandoned it (as in the present case) or the title has devolved upon others by his death, not being presently ascertainable. The statute steps in to provide a care taker and to vest present benefit in those who appear to be the owners, with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance. That the State must have some such power is manifest. The property is within its jurisdiction and under its protection. It is not in the interests of order or good government that property should lie ownerless or open to conflicting claims. If the absentee be really dead it is conceded that the proceeding is unimpeachable. But if he is dead, so far as can be learned, though the death be not absolutely proved, yet the effect to the State is the same, there is property in its charge, without a recognized owner. It must have power to meet such a case, or one of its chief functions as a government must go unperformed."

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The subject is very fully and ably considered by Mr. Justice White in giving the opinion of the Supreme Court of the United States in the same case, and the legality and propriety of the exercise of this governmental right is established historically as well as by sound reasoning. In view of these decisions the case of *Carr* v. *Brown*, 20 R. I. 215, and *Clapp* v. *Houg*, 12 N. D. 600, so far as they present a different view, should not be followed.

In the fundamental principles upon which the law rests there is no difference between the statute in Massachusetts and that in Pennsylvania. Each alike makes a reasonable provision for notice. As the proceeding is in its nature *in rem*, a personal notice to the absentee, which in most cases would be impossible, is not necessary to its validity. The constitutionality of our statute was assumed by the parties and the court in *George* v. *Clark*, 186 Mass. 426, and in *Purdon* v. *Blinn*, 192 Mass. 387.

The only part of our statute that is not covered by the decision of the Supreme Court of the United States is that which relates to the distribution of the property. As bearing upon that the language of Mr. Justice Mitchell in 206 Penn. St. 469, 475 is pertinent. He says: "But there must be a limit beyond which the State is not bound to have its laws set at defiance by the whim of an individual, and property kept in abeyance as to its ownership. If a child having title to property is taken out of the State and never heard of again, it would be nearly a century before it could be said with certainty that such owner was dead. The State is not bound to have the regular and lawful use and ownership of property subjected to such restrictions and uncertainty. If a fair and reasonable provision is made for the protection of the owner in case of his reappearance the State has not exceeded its constitutional powers."

The statute in Pennsylvania provides that a distribution of the estate of the absentee may be made in proceedings commenced after he has been absent and his whereabouts have been unknown for seven years, and it would seem that the estate might be settled and the distribution ordered within a comparatively short time after the expiration of the seven years. Upon such distribution the distributees must give security, to be

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approved by the court, that they will refund the amounts received with interest, should the absentee in fact be alive; but if they are not able to give such security, the money is to be put at interest, and the interest paid only to the distributees until security has been given, or until "the court on application shall order it to be paid to the person or persons entitled to it." Under this statute there is nothing to prevent the court from ordering the whole estate paid over to the distributees, without security, long before the expiration of fourteen years from the time of the absentee's disappearance. The principal difference between the two statutes is that, under this in Pennsylvania, the whole property might be distributed without security, if the court should order it, within a period that might not be more than nine or ten years from the disappearance of the absentee, while under our statute no distribution can be made before the expiration of fourteen years from his disappearance, at which time all his rights to the property are barred by the statute. This last is, of course, a statute of limitations. Viewed as such, if it is not unreasonable in the length of time which it gives an owner in which to recover his property within the jurisdiction of the State, it is not unconstitutional. *Call* v. *Hagger*, 8 Mass. 423. *Mulvey* v. *Boston*, *ante*, 178. One who wishes to preserve his right to property not in his possession must act with reasonable diligence in the assertion of his right. As to most kinds of personal property he is barred by our statutes at the expiration of six years from the time when he might have taken formal proceedings for his protection. A disseisin of him, continued for twenty years, deprives him of his real estate. As to property abandoned or left unclaimed or uncared for within the Commonwealth, the Legislature may well exercise the jurisdiction of the State to take it in charge and administer it, and may prescribe a reasonable time as a limitation of the right of the owner to reclaim it. The question how long a time must be allowed, in the interest of the owner, and in the interest of those claiming under him, as well as in that of the general public, is primarily for the Legislature to decide. Something might depend upon the internal condition of the State, as to the nature and density of the population, the kinds of business which are most followed, and other local considerations with

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which the Legislature would be familiar. In regard to such a kind of jurisdiction as is exercised under this statute, and the effect of long delay and uncertainty as to the ownership of property in the hands of a receiver, we cannot say that the Legislature might not properly enact that one's rights of property within our jurisdiction should be lost if he is absent for fourteen years without attempting to exercise them. In some respects this statute is more considerate of the rights of absentees than the statute of Pennsylvania which was held constitutional, while in other respects the other is more liberal. We cannot say that it was beyond the constitutional power of the Legislature to enact.

Decree affirmed.

G. R. Blinn, receiver, *pro se.*
A. L. Taylor, for the appellee.

HARRY R. DOW, administrator with the will annexed, *vs.* HARRY P. COLLINS ABBOTT & others.

Middlesex. December 4, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Devise and Legacy, What estate. *Tax*, Collateral legacies and successions. *Executor and Administrator.*

A testatrix, when she was sixty-five years of age, wrote a will in her own handwriting, which contained twenty-four clauses, fifteen of which described specific legacies for the most part of keepsakes and articles of adornment, eight described pecuniary legacies, and the first read, "I devise and bequeath to M. my cottage and all it contains at Nahant — to use for the term of five years or longer." M. was not related to the testatrix. The will contained no residuary clause nor any general phrase expressive of a desire to distribute all her property, and real estate which she owned at Wakefield valued at $4,500 and at Stoneham valued at $1,500 was not mentioned. Other parts of the will showed that the testatrix knew how to make an absolute gift. *Held*, that by the clause quoted the testatrix did not intend to give a fee, but an estate for five years and as much longer as the donee might desire, which, translated into absolute terms by invoking the presumption that the most advantageous gift was intended, gave to the donee an estate for life in the cottage and the land about it and the furniture and chattels therein.

A testator who died before January 5, 1904, by his will devised certain real estate

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and personal property for life to one who was not related to him, but made no disposition of the remainder. His heirs at law and next of kin at the time of his death were a brother and a nephew, the son of a deceased sister. The brother, after conveying his interest in the estate, died before the termination of the life estate. *Held*, that the life interest was subject to the tax on collateral legacies and successions under R. L. c. 15, § 1, to be assessed under § 16 of that chapter and to be paid by the administrator who then under § 5 could collect from the holder of the life estate so much as was due on the life interest; *also*, that the half of the remainder which vested in the brother was not subject to such a tax; and, *also*, that, by the provisions of R. L. c. 15, §§ 1, 4, and of St. 1902, c. 473, as amended by St. 1903, c. 276, the half of the remainder which vested in the nephew was subject to such a tax, to be paid by the nephew at the time when his estate vested in possession, and to be assessed upon the value of his estate at that time, except that at his option it might be paid at any time earlier upon a valuation then ascertained after deducting the value of the life estate; but that, if the nephew had not given the bond prescribed by St. 1903, c. 276, conditioned upon the payment of the tax when his estate should become vested in possession, then the administrator, at the expiration of two years from the death of the testator, should pay so much of such tax as was assessed upon the value of the nephew's interest in the personal property.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex February 26, 1907, by the administrator with the will annexed of the estate of Sarah M. Page Trow, late of Somerville, praying for instructions as to what estates Mary B. Morey and Harry Collins Abbott took under the first clause of the will in the cottage and its contents at Nahant; as to what amount of the tax due under the statutes for the taxation of collateral legacies and successions upon the personal and real estate at Nahant was due from Mary B. Morey, and as to what amount of such tax on the Nahant property was due from Harry Collins Abbott.

There was a hearing upon agreed facts in the Probate Court before *McIntyre*, J., who made a decree "that the words '— to use for the term of five years or longer' in the first clause of said will, are so uncertain, contradictory, and vague in their meaning that they ought not to be construed to take effect as a limitation upon the clearly expressed gift of the cottage and all it contains, which precedes it; that the defendant Mary B. Morey, therein named as devisee, takes an absolute estate in fee in the real estate and property described in the first clause of said will; and that the whole amount of the tax thereon under the statute for the taxation of collateral legacies and successions is to be paid by the said Mary B. Morey."

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On appeal to this court, there was a hearing before *Morton*, J., who reserved the case for determination by the full court.

The administrator was appointed January 5, 1904. The only heirs at law and next of kin of the testatrix at the time of her decease were E. Frank Page of Lawrence, a brother, since deceased, and Harry Collins Abbott of Andover, a nephew, (also called Harry P. Collins Abbott,) the son of a deceased sister. E. Frank Page, before his death, conveyed his interest to one Edward F. Page.

The appraisal of the real estate of the testatrix was as follows: "Cottage and land at Nahant, $2800; house, stable and land at Wakefield, $4500; cottage and land at Stoneham, $1500; total, $8800."

Other facts are stated in the opinion.

J. P. Kane, for Harry P. Collins Abbott and another.

A. P. Sawyer, for Mary B. Morey.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the treasurer and receiver general.

RUGG, J. The testatrix at the age of sixty-five, and about one year before her death, being a widow without issue, wrote her will in her own hand, except that she used the ordinary printed blank. The first clause was this: "I devise and bequeath to Mrs. Mary B. More of Lowell, Massachusetts, my cottage and all it contains at Nahant, Massachusetts — to use for the term of five years or longer." The question is what estate vested in Mary B. Morey (who is the person meant by Mary B. More) under this language. Mrs. Morey was no kindred of the testatrix, whose heirs at law were a brother and a nephew. The will contains twenty-four clauses, of which eight give pecuniary legacies aggregating $837, fifteen describe specific legacies, mostly keepsakes and articles of personal adornment, and one alone, being the one under discussion, touches real estate; of the pecuniary legacies four are for $200 each, one being to the son of her brother, another for the care of the cemetery lot, and the others to charitable institutions. The inventory of her personal estate aggregated $874.98, of which the furniture and effects in the house at Nahant were appraised at $488.50, deposits in savings banks at $209.73, and other chattels at $176.75. Her real estate consisted of three parcels, the one at Nahant, a

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house, stable and land at Wakefield, and a cottage and land at Stoneham.

The guiding rule in the interpretation of wills is to ascertain the intent of the one who executed it from the whole instrument, and then to give effect to that intent unless it conflicts with some inflexible rule of law. It is obvious that this testatrix did not intend to dispose of all her property by her will, for there is no residuary clause, nor any general phrase expressive of a desire to distribute all her property. The most valuable real estate she possessed is not referred to, and the value of all the property, which she mentions, is far less than the aggregate of her estate. Hence no inference against intestacy can be invoked to aid in the construction of a doubtful clause, nor can any importance be attached under these circumstances to the fact that she makes to each of her heirs at law trifling pecuniary gifts. The structure of the will indicates the distribution of tokens of remembrance and affection among friends and relatives and not a disposition of an estate as its main purpose. Although not using language with technical accuracy, the testatrix knew how to make an absolute gift, if such was her desire, as is shown by the clear gift outright of a ring to this same Mrs. Morey by clause eight. These attendant conditions are important considerations in determining the meaning of the first clause. It is to be noted that this is composed of a single sentence, a thought expressed in one breath. Although the words before the dash, if closed with a period and standing alone, would be sufficient to pass a fee, yet they do not stand alone and cannot be treated as the creation of a fee with an attempt later to cut it down to something less. To give this construction, it is necessary to interrupt the testatrix in the midst of a sentence before she had completed the expression of her thought. The structure of the sentence as well as its words militate against the contention that it gives a fee. It almost shows that, as the testatrix wrote the clause and completed the word "Massachusetts," she paused to read what had been written, and then perceived that these words by themselves made a larger gift than she intended, and with emphasis of punctuation she proceeded to complete the expression of the benefaction intended by stating that the extent of the gift was a use for five years,

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adding finally however, as it may have seemed to her that after all her beneficiary might desire a longer occupancy and she would be glad to gratify such desire, the words "or longer." In phrasing this thought, she used the word "term," apt to express an estate for years or life, but quite inconsistent with the idea of a fee. Looking at the clause not technically or narrowly but broadly, and as written by one not versed in the niceties of legal nomenclature, the conclusion is clear that it was not the intention to pass a fee by this clause. In no other way can effect be given to all the words used. The clause thus interpreted harmonizes with the scheme of the instrument, and the benevolent design of the testatrix is effectuated. Precedents are of small value in a case like this, but it is more analogous to *Faxon* v. *Faxon*, 174 Mass. 509, *Gilkie* v. *Marsh*, 186 Mass. 336, and *Fay* v. *Fay*, 1 Cush. 93, than to *Bassett* v. *Nickerson*, 184 Mass. 169, and *Pitts* v. *Milton*, 192 Mass. 88.

It remains to inquire the exact extent of the estate acquired by the devisee, and especially as to the effect of the words "or longer" after the five year term. These words should be given effect if it is possible to do so reasonably and consistently with the rules of law, for they are a part of the phrase in which the testatrix has given expression to her thought. *Dawes* v. *Swan*, 4 Mass. 208. They cannot enlarge the quality of the estate, but only its term, for it is to that subject alone that they relate. The most reasonable construction to give them is that the estate is for a period of time, as much longer than five years as the donee may desire. But this can be translated into absolute terms only by invoking the presumption that the most advantageous gift to her was intended. The longest term consistent with the quality of the estate created is for life. Therefore, as there is nothing elsewhere in the will to control, the clause means an estate for the life of the beneficiary. The same words describe both real and personal estate, and therefore she takes a life interest in each. See *Haynesworth* v. *Cox*, Harp. Eq. (S. C.) 117; *Dann* v. *Spurrier*, 3 Bos. & P. 399; *Webb* v. *Dixon*, 9 East, 15. The result is that Mary B. Morey takes an estate for her life in the cottage and land about it at Nahant (*Barrett* v. *Marsh*, 126 Mass. 213), and the furniture and chattels therein, with remainder in the heirs at law of the testatrix. It is not necessary

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to make any distinction between the real and personal estate, as the distributees and heirs at law are identical and receive the same shares.

The administrator asks for instructions as to the tax upon collateral legacies and successions, which is due from Mary B. Morey and from Harry Collins Abbott. The interest of Mary B. Morey is subject to taxation to be assessed on its value at the death of the testatrix, and the amount is to be ascertained according to R. L. c. 15, § 16 as amended by St. 1905, c. 367. *Hooper* v. *Bradford*, 178 Mass. 95. The tax is to be paid by the administrator, who has a right to collect that due on the real estate from Mrs. Morey, all as provided in R. L. c. 15, § 5. *Bradford* v. *Storey*, 189 Mass. 104.

The remainder in one half the cottage and its contents vested as intestate estate in a brother of the testatrix, and is free from any tax. R. L. c. 15, § 1. The remainder in the half which vested in Harry Collins Abbott is subject to a tax in accordance with St. 1902, c. 473, as amended by St. 1903, c. 276. As to the real estate it is plain that the tax is not payable until Harry C. Abbott comes into actual possession of the estate. It is to be assessed on its then value, except that at his option it may be paid at any time after deducting the value of the life estate, and is to be paid by him. It does not appear whether Abbott has given the bond required by St. 1903, c. 276. If he has, the provisions of the statute are clear as to the tax upon the personal property. If he has not given the bond required by the statute within one year after the death of the testatrix, then the tax as to the personal estate is due and payable as set forth in R. L. c. 15, § 4. It must be paid by the administrator upon the value, at the time of the death of the testatrix, of the interest coming to Abbott. The value of the life interest of Mrs. Morey is to be deducted in order to ascertain the value of the interest of Abbott. The statute makes no specific provision for a case exactly like this, but the values can be ascertained according to the method pointed out in R. L. c. 15, § 2, and St. 1903, c. 276, for analogous cases. *Howe* v. *Howe*, 179 Mass. 546.

Decree of Probate Court reversed.

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JAMES LE BARON *vs.* OLD COLONY STREET RAILWAY COMPANY.

Norfolk. December 5, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Street railway, In use of highway.

At the trial of an action against a street railway company to recover for personal injuries received by the plaintiff by reason of a collision on the highway between a wagon that he was driving and a car of the defendant, the evidence introduced by the plaintiff tended to show that he was seventy years of age and of good eyesight and hearing, that, at four o'clock on a hot afternoon in September, he was driving slowly on a highway, in which were tracks of the defendant, a horse, which was slow by nature and tired from hard work, attached to a heavy, empty and noisy coal wagon which had no cover, hood or awning of any kind; that, intending to cross the tracks, which were at the extreme left of the road, in order to enter a street on that side, he stopped his team five feet from them and looked in both directions and listened, but neither saw nor heard any car; that thereupon he started slowly across the tracks, and, when part way across, saw a car approaching on his left very fast; that, although he tried to get out of the way, the car struck the left hind wheel of his wagon, broke both wheels and various other parts of the wagon and went on for more than its length before it stopped; that, just before the accident, the speed of the car was increased and it was moving rapidly, and that the motorman was inexperienced. It also appeared that, from the place where he stopped before crossing the track, the plaintiff could see in the direction from which the car came at least three hundred feet. The defendant relied upon evidence which tended to contradict that of the plaintiff, and also to show that, before the collision occurred, the car was going very slowly. *Held*, that there was evidence for the jury from which they were warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent.

TORT for personal injuries received by the plaintiff and for damage to his wagon by reason of a collision with a car of the defendant at the junction of Main and Water Streets in Hingham. Writ in the Superior Court for the county of Norfolk dated December 10, 1903.

There was a trial before *Hitchcock*, J. It appeared that Main Street ran north and south; that Water Street ran in a northeasterly and southwesterly direction and entered Main Street on the easterly side, but did not cross it. Besides testifying as stated in the opinion, the plaintiff also stated that at the time of the accident he was driving with one horse an empty heavy coal

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wagon without cover, hood or awning of any kind; that on the same afternoon he had been to East Weymouth with the horse and wagon where he procured a load of coal which, shortly before the accident, he had delivered to a customer in the neighborhood; that it was a very hot day; that it was his habit to stop as he did before crossing a street car track; that he stopped five or six feet from the track and that, when he started up again, the horse, being slow by nature and having been working hard, started slowly; that the wagon made a noise when he was driving it; that, when the car struck the wagon, it broke both wheels, the tail board, the cross bar and the railings of the wagon and then passed on for more than its length before it was stopped.

Other facts are stated in the opinion.

At the close of the evidence, the defendant requested the presiding judge to rule that, on all the evidence, the plaintiff was not in the exercise of due care and was not entitled to recover, and that there was not sufficient evidence of negligence on the part of the defendant to entitle the plaintiff to recover. The rulings were refused and the defendant excepted. The jury returned a verdict for the plaintiff.

Asa P. French, (*J. S. Allen, Jr.*, with him,) for the defendant.

A. P. Worthen, for the plaintiff.

MORTON, J. This is an action to recover for injuries and damage to person and property caused by a collision between a car of the defendant company and a wagon in which the plaintiff was driving. The accident occurred in Hingham about four o'clock in the afternoon on September 4, 1903, at the junction of Main and Water Streets. The defendant company maintained and operated a single track on Main Street close to the easterly sidewalk. The plaintiff was driving slowly, with his horse at a walk, as he testified, in a southerly direction along Main Street "in about the middle of the travelled part of the road" between the track and the sidewalk on the westerly side of the street. When he got opposite Water Street he turned to cross the track for the purpose of going into Water Street. He testified that before he started to cross, he stopped and looked both ways and listened and neither saw nor heard any car and then drove on. Before he got across he saw a car coming southerly and started up his horse in an effort to get across, but before he could get across

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the car struck the hind wheel of his wagon throwing him out and causing the injuries and damage complained of. The plaintiff testified that he was seventy years old, but was in full possession of his faculties of sight and hearing and was familiar, and had been for a long time, with the running of the electric cars along Main Street by Water Street. The afternoon was bright, and at the trial the plaintiff estimated that the distance at which a car could have been seen northerly from Water Street was at least three hundred feet. Other witnesses estimated that the distance was much more. The evidence as to the speed of the car was contradictory. One of the plaintiff's witnesses said that the car was going quite fast, "fifteen miles an hour sure," another witness testified that it was going very much faster than usual, and the plaintiff testified that it was going very fast. Witnesses for the defendant testified that it was going slow, from five to seven miles an hour. The evidence was also contradictory as to whether there was any slackening of the speed before the collision, witnesses for the plaintiff testifying that there was not and witnesses for the defendant that there was. There was also testimony tending to show that the speed was accelerated just before the collision. There was also evidence tending to show that the regular motorman was absent and that the motorman who was taking his place on the day of the accident was of limited experience. It is difficult to understand how, if the plaintiff had looked and listened, as he testified that he did, before attempting to cross the track, he could have failed to see the car. It is equally difficult to understand how, if the car was going no faster than the defendant's evidence tended to show that it was and the motorman was exercising due care, he could have failed to stop the car in time to avoid a collision. But it is not for us to pass upon the weight of the evidence. In view of the contradictory nature of the evidence in regard to material matters it cannot fairly be said, we think, that the evidence was so conclusive in regard to the plaintiff's want of due care or the absence of negligence on the part of the defendant as to warrant the court in directing a verdict for the defendant. It is only when "the court can find no evidence which, in its deliberate and ultimate judgment, is entitled to be weighed" that "the jury should be instructed in terms that there is no evidence to support the

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burden of proof which rests upon the party." *Hillyer* v. *Dickinson*, 154 Mass. 502. See *O'Leary* v. *Haverhill & Plaistow Street Railway*, 193 Mass. 339; *James* v. *Interstate Consolidated Street Railway*, 193 Mass. 264; *Stubbs* v. *Boston & Northern Street Railway*, 193 Mass. 513; *Harris* v. *Fitchburg & Leominster Street Railway*, 193 Mass. 56; *Halloran* v. *Worcester Consolidated Street Railway*, 192 Mass. 104; *Williamson* v. *Old Colony Street Railway*, 191 Mass. 144; *Chaput* v. *Haverhill, Georgetown & Danvers Street Railway*, 194 Mass. 218.

Exceptions overruled.

ALBERT G. MORSE & another, trustees, *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. December 6, 1907. — February 25, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Betterment. *Statute. Constitutional Law. Boston. Certiorari.*

St. 1906, c. 393, § 9, relating to the assessment of betterments for street improvements in Boston, provides as follows: "This act shall not apply to any such improvement completed . . . before the passage of this act, nor to any such improvement ordered before the passage of this act so far as the act requires that said board of street commissioners shall estimate on the same day on which the order for the improvement is passed the benefit . . . to each parcel of real estate. . . . All such improvements ordered to be made before [the date when St. 1902, c. 521, went into effect], the construction of which was not completed until after that date, are to be assessed under this act or under [that]. . . ." *Held*, that these provisions permit an assessment of benefits accruing to estates abutting on Columbia Road, a street in Boston, an order for the laying out and construction of which was passed in 1897, and the work of constructing which was finished in 1905.

Acting under St. 1906, c. 393, § 5, relating to the assessment of the benefit accruing to each parcel of real estate beyond the general advantage to all real estate in the city from the laying out and construction or improvement of a street in Boston, the board of street commissioners determined that the total value of the special benefit resulting from the laying out and construction of a certain street was $300,000, which was less than one third of the amount which the city had had to pay for land damages alone, and, not deeming it necessary, did not consider the amount or the legality of the expenditures made in the course of construction by the superintendent of streets. One upon whose land an assessment for benefits was made petitioned for a writ of certiorari to quash the proceedings of the board, alleging that there had been illegal and improper expen-

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ditures by the superintendent of streets. *Held*, that the objection to the assessment could not prevail since in this case, the total amount of the assessment being less than the cost of the construction exclusive of the expenditures, the legality and propriety of which were questioned, the question of whether or not there were such illegal and improper expenditures was immaterial.

St. 1906, c. 398, §§ 5-9, relating to assessments for special benefits which accrue to certain land in Boston from the laying out, construction or improvement of streets beyond the benefit which accrues to other real estate in the city, are constitutional, and assessments made thereunder within two years after the work of construction of a certain street was completed in 1905, the order laying out the street having been made in 1897, are legal, although the ownership of the land may have changed since the order laying out the street, or even since the completion of the work and before the assessment, the tax being assessed upon the land and not upon the owner.

PETITIONS for a writ of certiorari against the board of street commissioners of Boston to quash their proceedings in assessing betterments for the construction of Columbia Road, filed October 9, 1907.

Paragraphs ten to thirteen, inclusive, of the petitions contained allegations in support of the contention described in the fourth paragraph of the opinion. The respondents in their return stated that they had determined as the special benefit and advantage to all the estates abutting on Columbia Road the sum of $296,443.69, which they determined as the assessable cost, and which was much less than one half of the amount which the board itself knew had been expended for land damages, and that, therefore, it was immaterial, in their opinion, whether or not any part of the sum certified by the superintendent of streets to have been expended on construction had been illegally expended, and that they made no inquiries concerning the details of said expenditures, and were ignorant of the manner in which the work was done and of the truth or falsity of any of the matters set forth in paragraph ten of the petition. The petitioners filed a motion for a further return of the respondents with regard to paragraphs ten to thirteen of the petition. There was a hearing before *Loring*, J., who denied the motion, refused to admit evidence in support of paragraphs ten to thirteen of the petition and, the petitioners excepting, reserved the case for determination by the full court.

Other facts are stated in the opinion.

G. W. Anderson, (*A. E. Lunt* with him,) for the petitioners.

T. M. Babson, for the respondents.

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KNOWLTON, C. J. These are petitions for a writ of certiorari to quash an assessment of betterments for the construction of Columbia Road in Boston. The cost of the improvement was $1,800,000, and the amount of the entire assessment was $296,443.69. The assessment was made under the St. 1906, c. 393, § 9. The order laying out the street and directing its construction was passed on August 31, 1897. The work of construction was finished on May 6, 1905.

The first question is whether the statute referred to authorized the making of an assessment for this improvement. The statute is as follows: "Section 9. This act shall not apply to any such improvement completed by said city before the passage of this act, nor to any such improvement ordered before the passage of this act so far as the act requires that said board of street commissioners shall estimate on the same day on which the order for the improvement is passed the benefit or advantage to each parcel of real estate from the whole or a part of the improvement, and this act shall not affect any assessment heretofore made therefor or the making of any assessment therefor, or the collection of any such assessment. All such improvements ordered to be made before the twenty-seventh day of June, nineteen hundred and two, the construction of which was not completed until after that date, are to be assessed under this act or under chapter five hundred and twenty-one of the acts of the year nineteen hundred and two, but the omission to make any estimate of the benefit or advantage by an order passed the same day the improvement was ordered shall not in any way invalidate or affect the assessment." This act (§ 2) and also the St. 1902, c. 521, which it superseded, required the street commissioners to estimate, on the same day on which the order for the improvement was passed, the benefit or advantage to each parcel of real estate from the whole or a part of the improvement. Presumably all orders for such improvements made after June 27, 1902, contained such an estimate. Both parts of the quoted section relate to orders passed without such an estimate, and in that respect they seem to refer to improvements ordered under earlier statutes.

Standing alone, the first sentence of the section is ambiguous. It might mean that the act shall not apply at all to an improvement completed before the passage of the act, or it might mean

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that the first clause of the sentence, like the second clause, is qualified by the words "so far as the act requires that said board of street commissioners shall estimate on the same day on which the order is passed, the benefit," etc. The second sentence seems to make the meaning plain, and to show that the qualification applies to the first clause of the sentence as well as to the second clause. This says explicitly that, "All such improvements, ordered to be made before the twenty-seventh day of June, nineteen hundred and two, the construction of which was not completed until after that date are to be assessed under this act," etc. This includes the present case, and we hold that the section was intended to authorize assessments for improvements ordered under earlier statutes.

The petitioners allege that the statutes as to the method of making contracts and doing the work were not complied with, and contend that for this reason no assessment can be made. The statutes considered and the doings of the street commissioners in *Warren* v. *Street Commissioners*, 181 Mass. 6, were materially different from those in the present case. The St. 1894, c. 416, § 3, under which they acted in that case, provide that said board shall assess "a proportional share of said cost upon the real estate which said board shall adjudge receives any benefit and advantage from such laying out and construction, or either of them, . . . beyond the general advantages to all real estate in said city," etc. This cost was the entire cost of the improvement, and the board proceeded to determine it, including the cost of a large amount of work done in violation of the statute, and to assess a proportional part of it upon the estates benefited.

The St. 1906, c. 393, § 5, is in part as follows: "Said board within two years after the completion of any improvements specified in section two shall determine the value of the benefit or advantage aforesaid to each parcel of real estate beyond the general advantage to all real estate in the city, from the whole or a part of the improvement, shall determine as the assessable cost of the improvement such part, not exceeding one-half, as the board shall deem just, of the expenses incurred by the city for such whole or part of the improvement, . . . and shall assess on each parcel a proportional share of said assessable cost, not

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exceeding the value of said benefit to the parcel as estimated or determined as aforesaid." The first thing that the board is required to do is to determine the value of the benefit, and this not necessarily the benefit from the whole improvement, but from the whole or any part of it. They are then to determine, as the assessable cost, such part of the expenses incurred by the city for such whole or part of the improvement, not exceeding one half, as they shall deem just. In the present case, after determining the value of the special benefit, the board deemed it just to fix the assessable cost at a sum which was very much less than one half, indeed, less than one third, of the expenses incurred by the city for land damages alone. They say in their return that they did not deem it necessary to consider the cost of construction in detail, or to inquire whether any part of the sum certified by the superintendent of streets was illegally expended or not, and that they made no inquiry in regard to it. We are of opinion that they were right in their view that, under this statute, upon the other facts and findings, they did not need to ascertain whether the methods of construction were legal or illegal. This question had nothing to do with the amount of the special benefit. Knowing that the amount of the land damages paid was more than three times the whole special benefit, the board might well deem it just to determine the assessable cost as the entire amount of the special benefit, without reference to any details of the cost of construction. This objection to the assessment cannot prevail.

The petitioners contend that, as applied to streets laid out and constructed under statutes enacted prior to the St. 1902, c. 521, the section under which the board acted is unconstitutional. It was decided in *Hall* v. *Street Commissioners*, 177 Mass. 434, 440, and *Warren* v. *Street Commissioners*, 187 Mass. 290, that special taxation upon land for peculiar benefits received from an improvement may be authorized after as well as before the expenditure is incurred, if in other respects such taxation is warranted. Numerous authorities were cited in support of these decisions. It appears in the present cases that in some of the lots assessed changes of ownership occurred after the street was laid out, and perhaps after the work of construction was finished, and before the assessment was made. It is contended that an assessment

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upon the land in the hands of the new owners is a taking of their property without due process of law. Similar questions were considered in *Butler* v. *Toledo*, 5 Ohio St. 225, *Howell* v. *Buffalo*, 37 N. Y. 267, 273, *Righter* v. *Newark*, 16 Vroom, 104, *In re Commissioners of Elizabeth*, 20 Vroom, 488, *Brevoort* v. *Detroit*, 24 Mich. 322. See also Dillon Mun. Corp. (4th ed.) § 814. In the first of these cases the court said of the land owner, "He purchased his lots subject to any burden which the State might lawfully impose, and we cannot perceive how the vested rights of complainant are any more impaired than are those of every recent purchaser of real estate in Ohio, whose estate is now yearly taxed for the payment of interest and principal on a State debt contracted long before his purchase."

The argument of the petitioners seems to disregard the fact that a tax of this kind is assessed upon the land, for the special benefit received by it, and not upon its owner. It is collectible only from the land. It is true that the owner usually pays it because of his interest in the land; but the assessment is made upon the property, without regard to where the ownership of it happens to be, or to whether it changed while the construction was going on or after it was completed. One buying land which has received special benefits from an improvement that has just been completed, but has not been paid for, is bound to know that it is liable to be specially taxed for benefits, just as he is bound to know, if he then first becomes a resident of the city or town, that he will be subject to general taxation to make up so much of the unpaid cost of the improvement as is assessed upon the general taxpayers. If there is a statute which subjects the property to a special tax when he takes his title, the liability is an encumbrance. *Blackie* v. *Hudson*, 117 Mass. 181. If there is no such statute, it is not technically an encumbrance. *Maloy* v. *Holl*, 190 Mass. 277. But in such a case the liability to special taxation, under a statute that may be passed for that purpose, does not differ in principle from the liability upon one who becomes an inhabitant of a city or town which has contracted a large debt that must be paid by taxation, either under existing laws or other proper laws that the Legislature may pass for the purpose. One about to take up his residence in such a city or town may well consider the probability of large general taxation to

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pay such a debt, and one about to buy land which has received a large special benefit for a public improvement which has not been paid for will naturally consider its liability to taxation, in determining what price he will pay. It is suggested that, under this construction of the statute, an assessment may be made many years after the benefit has been received. This by no means follows. In the first place, this statute permits an assessment only within two years after the work of construction is completed. Secondly, a Legislature would hardly attempt to authorize an assessment of benefits for an improvement many years after the completion of the work, and after the cost of it had been provided for in such a way that it had ceased to be a subject properly calling for special consideration and action. We are of opinion that the statute, as construed by the board of street commissioners, is constitutional.

Petitions dismissed.

WILLIAM B. ALLEN *vs.* BOSTON AND MAINE RAILROAD.

Essex. November 7, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Railroad, In use of highway.

At the trial of an action of tort against a railroad company to recover for personal injuries received by the plaintiff by reason of a collision between an ice wagon which he was driving and a train of the defendant at a grade crossing of the railroad with the highway, it appeared that, at a distance of twenty-five feet from the crossing, there was a clear view of the track in the direction from which the train came for seven hundred and sixty-six feet, that the accident happened about noon on a clear day in May, that previous to the collision the plaintiff had been driving the ice wagon for about four hundred feet in a highway nearly parallel to and near to the railroad track from the same direction from which the train approached, that the wagon was partly filled with ice and was covered so that the plaintiff could see in no direction excepting in front unless he leaned forward from his seat. The plaintiff testified that, when about twenty-five feet from the crossing, he leaned forward and looked up the track in the direction from which the train came and saw no train, that he was familiar with the neighborhood and with the crossing, knew that there was a train due about that time but thought that it had passed, that his horses were walking and could have been stopped within ten feet until just as they reached the crossing, when they suddenly broke into a trot, and the train of the defendant, going at

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the rate of about twenty miles an hour, struck the wagon. *Held*, that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of due care.

Where, at the trial of an action of tort against a railroad company to recover for personal injuries received by the plaintiff by reason of a collision between an ice wagon, which he was driving, and a train of the defendant at a grade crossing of the railroad with a highway, the admitted physical surroundings of the crossing, the time and the atmospheric conditions were such as to show ample opportunity for the plaintiff, who had good eyesight, by looking, to ascertain in time to protect himself from danger whether a train was approaching, it is not enough, in order to furnish evidence sufficient to warrant the submission to the jury of the question whether the plaintiff was in the exercise of due care, for him to say that he looked but failed to see an approaching train.

TORT for personal injuries received by the plaintiff in a collision between an ice cart that he was driving and a train of the defendant at the Marble Ridge grade crossing in North Andover. Writ in the Superior Court for the county of Essex dated July 26, 1906.

There was a trial before *Bell*, J. Besides testifying as stated in the opinion, the plaintiff in cross-examination stated that there were sides to his wagon and the seat was back so that the only view he had, without leaning out around the side, was straight ahead. He admitted, at first, that when he looked as he testified, twenty-five feet from the crossing, all he saw was the crossing straight ahead. He subsequently changed this and testified that when he was twenty-five feet from the crossing he looked around and saw the flagman coming behind him, and that he did not look for a train at that time. Still later he testified that when he was twenty-five feet, and again when he was four feet from the crossing, his looking consisted in simply looking ahead on the crossing. But later still he testified that when he was twenty-five feet from the crossing he did look up the track to see whether a train was coming, but he would not say that at that look he took in more than seventy-five or one hundred feet of track. He also testified that he would not say that, when twenty-five feet from the crossing, he could not have seen seven hundred feet south on the track. He at first stated that at no time from the time he turned the corner at the fence did he lean out of his wagon and look up the track to see how far he could see or whether he could see a train, but later stated that he did look up the track particularly to see whether there was a train coming. He also stated that

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when, leaning out and looking back, he saw the flagman running after his team "he thought it would be kind of nice to see him run to catch up with the team and jump on," and that that was in his mind, although the train and his horses were in his mind too.

Other facts are stated in the opinion.

At the close of the evidence, the defendant, among other requests, requested the presiding judge to rule that, upon all the evidence, the jury would not be warranted in finding that the plaintiff was in the exercise of due care. The request was refused and the defendant excepted. The jury found for the plaintiff.

D. E. Hall, for the defendant.

J. P. Sweeney, H. R. Dow & L. S. Cox, for the plaintiff.

RUGG, J. This is an action of tort for personal injuries received by the plaintiff at a crossing at grade of a highway with a single track branch of the defendant. The plaintiff was driving a pair of gentle easily controlled horses hitched to an ordinary ice cart. He crossed the track of the defendant by an overhead bridge just south of a station of the defendant, and drove down and along the highway, which was an irregular semicircle to the northward, a distance of four hundred seven feet to the grade crossing, which was north of the station. The first half of this distance was a descending grade of five or six per cent, and the two hundred feet lying next to the grade crossing was substantially level. The cart was partially loaded with ice. The plaintiff trotted his horses down the hill, but they walked along the level space until they were at the crossing, when they suddenly broke into a trot, and immediately the wagon was struck by a train coming from the south, and the plaintiff was injured. He is bound to show that he was in the exercise of due care. The accident occurred at about half-past twelve on the afternoon of a bright day in May. There were no other travellers on the highway, except that a flagman of the defendant, one of whose duties was to flag this crossing, according to the plaintiff's testimony was running behind his vehicle.

The plaintiff was familiar with the neighborhood and crossing. He knew a train was due at about the time of the accident, but thought it had passed. There was no dispute that, as one ap-

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proached the crossing from the direction in which the plaintiff came, the only obstruction to a view of the tracks to the south, from which the train came, was the station, and that at a point forty-six feet from the crossing in the highway there was a clear view of the tracks southerly measured from the centre of the crossing, three hundred and seven feet; at a distance of thirty feet, a like view for four hundred and two feet; at twenty-five feet, for seven hundred and sixty-six feet; at fifteen feet or nearer, for sixteen hundred and seventy-nine feet. The plaintiff testified that he could easily stop his team on this road, with its load and rate of speed, within ten feet. The only evidence as to the speed of the train was that it was going about twenty miles an hour. The plaintiff testified that he looked for a train at about twenty-five feet from the crossing, but saw none. Upon this state of the evidence it is obvious that the failure of the plaintiff to see the train in time to save himself from danger was due to his own negligence. It was possible for him when he was in a place of safety to have looked down the track a distance far enough to have seen any approaching train. The circumstances do not show anything to distract his attention from the track, nor is any excuse shown for failure to observe that which was within view. Indeed, the noise of his own cart and load, hindering the warning that might otherwise come through his hearing, imposed upon him a greater obligation to actively use his other senses to obtain information for his security. A railroad grade crossing is universally recognized as a place of great danger. While there is no hard and fast rule in this jurisdiction that a traveller approaching such a crossing must invariably stop to look and listen, yet he must actively and intelligently exercise whatever faculties may reasonably be expected to give warning of impending danger. Where the admitted physical surroundings of a crossing, time and atmospheric conditions are such as to show ample opportunity for a traveller to know whether a moving train is near in time to protect himself from danger, it is not enough for him to say that he looked but failed to see an approaching train. The inference is irresistible that such looking is careless. *Roberts* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 296. *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242. *Beirne* v. *Lawrence &*

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Methuen Street Railway, *ante*, 173. A traveller is not obliged to look where sight is so obscured as to afford him no intelligence, nor to listen if conditions are such that there can be no hearing, because under these circumstances he can gain nothing thereby. But when sight or hearing will tend to give information which can be utilized for his safety, then he must use these faculties.

The undisputed circumstances of the present case show that if the plaintiff had exercised ordinary precaution he might have seen the approaching train in time to avoid harm. His failure to do so made it the duty of the trial court to grant the second prayer of the defendant. *Raymond* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 337. *Hamblin* v. *New York, New Haven, & Hartford Railroad*, 195 Mass. 555. Cases like *Manley* v. *Boston & Maine Railroad*, 159 Mass. 493, where the burden rests upon the defendant to prove gross negligence on the part of the traveller, have no bearing upon the present case.

Exceptions sustained.

JOHN P. JOHNSON *vs.* J. M. GUFFEY PETROLEUM COMPANY.
SAME *vs.* BOSTON AND MAINE RAILROAD.

Essex. December 12, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Railroad in highway.

At the trial of an action of tort against a railroad company for personal injuries received by the plaintiff through being run over by a train of the defendant, it appeared that, at about three o'clock on a morning when there was no moon, a box freight car was being pushed by an engine at the rate of three miles an hour on a spur track owned by a private person which was upon the side of a street, on the right hand as the car proceeded, that a foot path or sidewalk lay to the right of the track, that the street was in a business district of a city near a wharf where there were but few dwelling houses and where hardly any traveller would pass after nightfall. The car and engine were the property of the defendant and at the forward end of the car as it proceeded were two employees of the defendant, each with a lantern, who were keeping a lookout on the track in front. The plaintiff was lying unconscious just outside of the right hand rail with his body at right angles with the rail and only his arm extended across it. Eight feet back from that rail was a line of fence and buildings. The train was

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being preceded down the track, as was customary, by an employee of the person who owned the track for the purpose of warning travellers of its approach. The defendant's employees did not see the plaintiff until it was too late to prevent running over his arm. *Held*, that there was no evidence for the jury on the question of the defendant's negligence.

At the trial of an action of tort against one who maintained a spur track for use in connection with his mercantile business, running from the main line of a railroad upon the side of a public street through a business district containing few dwelling houses and leading to wharves, to recover for personal injuries alleged to have been received by the plaintiff by reason of negligence on the part of an employee of the defendant whose duty it was to see that there were no obstructions upon the track and to precede cars and engines running thereon to warn travellers in the street, either on foot or in vehicles, so that no injury should be caused to them, it appeared that the plaintiff was run over by a box freight car which was being pushed down the track by an engine at the rate of three miles an hour at three o'clock on a morning when there was no moon, that, when run over, the plaintiff was lying unconscious just outside of the rail at the right as the train proceeded, with his body at right angles with and only his arm extended across the rail, that the travelled part of the street was wholly at the left of the track excepting a narrow footpath on the right, about eight feet beyond which was a line of fence and buildings, that the defendant's employee within half an hour had passed over the track with a lantern, walking between the rails, and that at that time the plaintiff was not there, that, as the train proceeded, the defendant's employee preceded it, keeping about one hundred feet in front, with his lantern, but walking in the street to the left of the track, and that he passed by the point where, on the other side of the track, the plaintiff lay with his arm across the rail, and did not see him, and the train, following, ran over the plaintiff's arm. *Held*, that, considering the conduct of the defendant's employee with reference to the danger which he had reason to apprehend and the kind of observation that he would be expected to make in the performance of his duty, there was no evidence from which the jury would be warranted in finding that either he or the defendant was negligent.

TWO ACTIONS OF TORT for personal injuries alleged to have been received by the plaintiff by reason of negligence of employees of both defendants whereby he was run over by a freight car propelled by the railroad company on a track of the petroleum company running along Water Street in Beverly. Writs in the Superior Court for the county of Essex dated November 21, 1904.

There was a trial before *Wait*, J. The facts are stated in the opinion. At the close of the evidence by direction of the presiding judge a verdict was returned for the defendant in each case, and the plaintiff excepted.

The cases were submitted on briefs.

A. P. White & G. C. Richards, for the plaintiff.

H. F. Hurlburt & D. E. Hall, for the defendants.

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KNOWLTON, C. J. The first of these two defendants has its place of business on Water Street in Beverly. It obtained the privilege of laying a steam railroad track from this place, through the street, to the main line of the Boston and Maine Railroad, running from Salem to Newburyport. It was admitted at the trial that this track was lawfully laid, that trains were lawfully operated upon it, and that the defendants were lawfully on the street at the time of the accident hereinafter referred to. The Petroleum Company hired one Buckle to look after the condition of the track, and, when it was to be used in the night time, he was accustomed to pass over it with a lantern, to the junction with the main line, and then to precede the engine and cars on the way back, for the purpose of warning persons on the street. Water Street runs nearly east and west along the water front, from the head of Beverly bridge until it enters Lothrop Street, which leads easterly along the North Shore. The street at the place of the accident is thirty-one or thirty-two feet wide, and around the curve to the east it is narrower. The railroad track is laid near the south side of the street. On each side there is a narrow path or walk, of dirt, which is on a level with the track, and there are no gutters. The travel with teams is on the northerly side of the track. The southerly rail of the track is eight feet from the nearest face of a pole, standing at the side of the street near where the plaintiff was injured, and about the same distance from the general line of the fence and the buildings on that side of the street. The track between the rails is four feet eight and one half inches in width. There are wharves and docks not far from the place of the accident, and, except for a few old dwelling houses, the structures on the street are used for business purposes. The distance from the junction to the works of the Petroleum Company is nearly sixteen hundred feet.

At about a quarter before three o'clock in the morning of September 7, 1904, six servants of the railroad company went from Salem to Beverly, and hitched their locomotive to a freight box car, and started to push it over this track to the petroleum works. Buckle was preceding them with a lantern, about one hundred feet in advance of the car. The conductor, McCormick, and the brakeman Morancy were standing on the front of the car, the former near the corner, holding by the ladder, and

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the latter on the draw bar, and each was carrying a lantern and looking out upon the track in front. The car and engine were going at the rate of about three miles in an hour, when suddenly the two men in front discovered a dark object on the ground just south of the track, about three feet ahead of the car. The conductor made an outcry to stop the car at once. The car was stopped quickly, but the forward wheels passed over one hand and one arm of the plaintiff, who was lying on the ground south of the track, his feet pointing southward and his hands extending over the southerly rail.

The first question is whether there was any evidence that the plaintiff was in the exercise of due care. It appeared that he was a native of Sweden, about thirty-four years of age, and that he had then lived in this country nearly two years. His business was that of a carpenter and house builder. He testified that, on Tuesday, the day before the accident, he worked at his trade in Peabody, and at half past four o'clock returned on his bicycle to the Cabot House in Beverly, where he boarded. In the evening he went to Salem, to the house of the Scandinavian Sick Benefit Society, of which he was a member. There was a political meeting there which ended about ten o'clock, and after that he remained, with others, until one o'clock, when he left the house alone, some of his companions remaining longer. It appeared that, after the political meeting, there was a half barrel of beer there, from which members were drinking, that there was no charge to those who drank; that some of the party were smoking, some were singing and some were talking. He testified that he drank only two glasses of beer. He accounted for his presence near the track by saying that, when he went over the bridge to Beverly on his way home, he "noticed, in regard to the weather, it was kind of an indication it was going to be windy," that he had left his sail boat at anchor in Beverly Harbor after using it on the last Sunday, but the anchor rope was short, and he left it not quite ship shape; that he had a row boat tied up at McAdams' wharf, and, instead of going home, he went down Water Street to the wharf, which is just east of the place of the accident, and got this boat, and went out to the sail boat and gave it more rope, then went back with the dory and tied it up in its place, and went upon Water Street and walked

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towards Cabot Street. He said that he remembered being right in front of the brick building which is on Foster's wharf, and remembered nothing more until after the accident. He testified that he went to his sail boat on the Monday before, which was Labor Day, but did nothing to make it more secure, and had done nothing about it between the Sunday when he left it there and this morning on which he was hurt. He also testified that, three times since he came to America, he had had a fainting spell, but that each of these times was in the house of one Frieburg, with whom he was boarding; that he had a few fainting spells before he left his native country; that when he was fourteen years old a ladder broke, and he fell and hurt his head, and that his first fainting spell occurred very soon after that.

The plaintiff contended that the jury might find from this evidence that he was taken with a fainting spell, of which he was entirely unconscious, and that, while in this condition, he fell down near the track, without any lack of care on his part, and was injured solely through the negligence of the defendants.

If we assume in favor of the plaintiff, without deciding, that his testimony, if believed implicitly in every part, would warrant the jury in finding that he was in the exercise of due care, we come to the question whether there was evidence of negligence on the part of either of the defendants. Considering first the servants of the defendant railroad company, there is nothing to show that it was negligent to push the car over this track. There was no turntable near the place from which the car was taken. The car was being moved very slowly, and the conductor and a brakeman were on the forward end of it, at the level of the draw bar, looking out to see that the track was clear. There was no moon, nor any light on the street in that vicinity. A dark object lying on the dark ground, with buildings and the fence not far away, would not be visible at any great distance. The plaintiff in his brief says: "The evidence is clear that, stationed as they were, 'keeping a lookout ahead,' 'watching right ahead,' it was impossible for them to see a man lying partly across one of the tracks until actually upon him, . . . so near as to be unable to stop the slowly moving train until after one truck had run over him." Then, too, they had a right to rely to some extent upon Buckle, who was going on before

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them as a watchman, with his lantern. We think it plain that there was no evidence of negligence on the part of this defendant's servants. There was no evidence, and it was not contended, that Buckle was a servant of the railroad company. The verdict was rightly ordered for the defendant railroad company.

The question whether there was any evidence of negligence on the part of Buckle, the servant of the Petroleum Company, is more difficult. It is to be remembered first that he had passed over the track, walking between the rails, carrying his lantern and a shovel, about half an hour before the accident, on his way from the works to the junction. He carried his shovel to clean off any obstructions that might be on the track, and he testified that his examination was such as to make him certain that there was no one on the ground in dangerous proximity to the track at that time. Moreover, at the trial the plaintiff's counsel stated their claim to be that the plaintiff was not then there, but came there afterwards.

It was not negligent for Buckle, while walking before the train with his lantern, in the night time, to walk just to the left of the track rather than upon it. This was only a reasonable provision for his own safety, in reference to the possibility of his falling accidentally, and it did not interfere with his making such an observation of the track as seemed reasonably necessary under the circumstances. Besides, his particular and important duty could best be performed while walking there. All travel by teams was on that side of the tracks. The chief danger to be guarded against was the frightening of horses from meeting a locomotive engine and a train of cars in a very narrow street. It was to be supposed that pedestrians would exercise reasonable care for their own safety. The evidence shows no lack of due care in the manner in which Buckle was performing his duty.

The only ground on which an argument for the plaintiff can be founded is the fact that Buckle did not see the plaintiff. The question thus presented is whether his failure to see the plaintiff justifies an inference, from that alone, that he was not in the exercise of reasonable care. The principle invoked by the plaintiff is that which is involved in the doctrine of *res ipsa loquitur*. To test the question all the circumstances must be considered. In the first place the photographs and the other

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evidence show that this was a street in which one would hardly expect to find any travellers after nightfall. There were but few dwelling houses upon it. It was not on a main line of travel, but was a very short street, turning out from the main thoroughfare, and running around by the wharves, and up into the principal street again. The time of the accident was in that part of the night when hardly anybody is abroad, even on the great thoroughfares in a region of residences. Then Buckle had been over the track and had inspected it with his lantern only a short time before the car came along. In going back there was only a chance that some one had come into that unfrequented street between two and three o'clock in the morning, and had fallen helpless on the track, in the short time that had elapsed after his inspection of it. This chance was so exceedingly small as not to call for a minute inspection of every part of the ground, in reference to that possibility alone. The principal purpose of Buckle's employment was to look out for travellers, either in vehicles or on foot, so that their horses might not be frightened or they themselves injured by a locomotive engine in a narrow street. Travellers by night, as well as by day, are expected to be well above the ground, and not lying upon it. His means of observation were only such as his lantern would afford him in a night when there was no moon. In the proper performance of his duty he would be expected to keep his eye at an angle of elevation which would best discover moving objects, not those lying on the ground.

But so far as the track itself was concerned, there was hardly anything to be seen if he looked over the whole space throughout every yard of his course. There was nothing but the plaintiff's hands extending over the southerly rail. His body and legs were lying on the dark ground outside, at right angles to the track. When we consider the dim, indistinct vision of the ground which one gets while walking with a lantern, and the small area of a common lantern's illumination of the ground as it is ordinarily carried, we do not think that Buckle's failure to notice the plaintiff's hands and arm upon the rail, if we assume that they were there when he passed by, indicates negligence on his part. The burden is upon the plaintiff to introduce evidence of negligence.

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Buckle's conduct is to be considered with reference to the dangers which he had reason to apprehend, and the kind of observation that he would be expected to make in the performance of his duty. His principal duty, after having inspected the tracks a short time before, was to be alert for the discovery of moving objects, rather than to examine every yard of the ground to see if he could find any one lying outside of the track, with a hand or a foot extending over upon it.

The facts presented resemble those in *Kupiec* v. *Warren, Brookfield & Spencer Street Railway*, 196 Mass. 463, and the principles involved are the same as in that case. We are of opinion that they call for the same kind of a decision.

Exceptions overruled.

ELMER G. DAVIS *vs.* JAY B. CRAWFORD.

Suffolk. November 11, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Limitations, Statute of. Contract, Performance and breach.

In an action on an instrument in writing by which the defendant acknowledged the receipt of $200 for use and investment in a certain mine, and agreed that if no profits or returns were received from the mine within six months he would return the $200 with interest, it appeared that no profits or returns were received within six months or at any other time. The statute of limitations was pleaded. The date of the writ was more than six years after the date of the agreement declared on, but less than six years from the expiration of six months after that date. *Held,* that under the terms of the agreement nothing could have been due until the expiration of six months from its date, and therefore that the action was not barred by the statute.

CONTRACT upon an instrument in writing dated July 14, 1898, which is quoted in the opinion. Writ in the Municipal Court of the City of Boston dated January 7, 1905.

The defendant in his answer, in addition to a general denial and an allegation of payment, set up the statute of limitations.

On appeal to the Superior Court the case was heard by *White*, J., without a jury. The plaintiff introduced in evidence the agreement signed by the defendant which is quoted in the

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opinion and certain agreed facts which are stated in the opinion. The defendant asked for a ruling that the statute of limitations began to run against the plaintiff's claim on July 14, 1898, and that the action was barred by the statute of limitations.

The judge refused to rule as requested, and found for the plaintiff in the sum of $287.07. The defendant alleged exceptions.

The case was submitted on briefs.

S. L. Whipple, W. R. Sears & H. W. Ogden, for the defendant.

S. R. Cutler & H. W. James, for the plaintiff.

RUGG, J. The only question raised by these exceptions is when the statute of limitations began to run upon the following instrument:

"Boston, July 14, 1898.

"I have this day received from Elmer G. Davis two hundred dollars for use and investment in the Cottonwood mine situated in Chaffee Co., Colorado, Whitehorn District; and I agree that if said mine proves successful that I will pay him from the first profits or returns received by me the sum of four hundred dollars, and if no such profits or returns are received by me within six months from this date I agree to return to said Davis the said two hundred dollars with interest.

"Jay B. Crawford."

It was agreed that $200 was paid to the defendant upon July 14, 1898; that the mine referred to in the agreement did not prove successful, and there was no profit or return received within six months from July 14, 1898, or at any other time, and that no demand was made upon the defendant for the return of the money until within a few days before the bringing of this action. It is plain that upon these facts the statute of limitations did not begin to run until January 14, 1899. The contract is not to pay upon demand, but a specific agreement to pay in two contingencies two different amounts: if the mine proves successful, $400 are to be paid out of the profits, and if no profits are made within six months from its date, then the $200 with interest is to be returned. Upon the facts agreed, nothing could have been due until the expiration of six months. Any action brought before that time would have been premature.

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Therefore, the statute of limitations did not begin to run until January 14, 1899, and the present action instituted on January 7, 1905, is not barred.

Exceptions overruled.

ELLEN M. THOMPSON *vs.* INHABITANTS OF BOLTON.

Middlesex. November 11, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Defect in highway. *Negligence.*

In a little used back road of a country town, on which the town has made repairs within six years, the combination of a stone projecting six or eight inches above the surface close to a wheel rut and within a short distance a sharp stone jutting into the wheel rut, a place where a wheel is likely to get caught and a third stone against which the wheel of the wagon of a traveller strikes, throwing him out of the wagon, if this state of things is shown to have existed for two years, can be found to constitute a defect in the way making the town liable to the traveller thus injured.

In an action by a woman against a town for an injury caused by an alleged defect in a little used country road, on which the defendant had made repairs within six years, having only three houses on it, in one of which the plaintiff lived, if there is evidence that the plaintiff knew of the existence of the defect but was obliged to use the road, as it was her only way of going to and from her home, and that being conscious of the danger she was trying to avoid it at the time of her injury, the question of her due care is for the jury.

TORT under R. L. c. 51, § 18, against the town of Bolton for injuries incurred from an alleged defect in a road over Long Hill in that town leading from the Hudson Road, so called, to the Stowe line, and alleged to be a highway, while the plaintiff was driving a horse in an open wagon about nine o'clock in the morning, returning from having taken her children to the "barge" to be driven to school. Writ dated April 24, 1902.

At the trial in the Superior Court before *Bishop*, J., the evidence was introduced which is described in the opinion. The defendant asked the judge to rule that on all the evidence the plaintiff could not recover, that there was not sufficient evidence to justify the jury in finding that the place of the alleged defect was in a public way which the defendant was bound to keep in

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repair, and that on all the evidence the plaintiff was not in the exercise of due care and could not recover. The judge refused to make these rulings, and left the question whether the road was a public way to the jury under instructions to which no exceptions were taken, also instructing them in regard to the obligation of the plaintiff to use due care on the road and to avoid defects. The jury returned a verdict for the plaintiff in the sum of $600; and the defendant alleged exceptions.

C. F. Choate, Jr., for the defendant.

H. N. Allin, for the plaintiff, was not called upon.

RUGG, J. The place where the plaintiff was injured was on a little travelled back road. There were three houses on it in one of which the plaintiff lived. There was no evidence that it had ever been laid out as a highway, but there was evidence that it had been used for more than twenty years as a way, that its side lines were marked by walls, and that repairs had been made upon portions of it by officers of the defendant within six years. The plaintiff had been using the road frequently, and knew of the place where the injury occurred for about two years. Her description of the accident was as follows: "It was about nine o'clock in the morning . . . May 7, 1901. I saw two wood teams coming and I turned out, waiting for these to pass, and then started on; and as I came towards the dry bridge, . . . I had to swing to the right to avoid a stone, and immediately to the left again. As I swung to the left I thought of a place on my left where I had got the wheel caught once before and immediately bore to the right. I tightened the reins quickly and the horse sprang forward and drew me on to and over this stone. . . . The wheel went down over the stone and I was thrown. . . . The first stone . . . was where the water had gullied out and left this rock uncovered. . . . The first stone . . . was uncovered up to about that height, a rough guess, six or seven inches; . . . it was a rough stone. I do not know whether that stone formed one of the covering stones of the dry bridge or whether it was a boulder at the side of the dry bridge. It was close to it. . . . There was only a point up in the road . . . in the wheel rut. The stone . . . over which the wheel went . . . was a large upright stone. I should say a boulder that had been in the road and the gravel had been washed away to the depth

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of a number of inches. It was at the right of the wheel rut, close to the wheel rut. . . . From the top of that stone to the ground I should say was seven or eight inches if not more."

This showed a condition of the road, which the jury might have found to be defective. This is not a case of a single stone just outside the travelled way six or eight inches high, but of a combination, within a short distance, of a sharp stone jutting into the wheel rut and a place where a wheel was likely to get caught and the stone against which the wheel struck. *Rust* v. *Essex*, 182 Mass. 313, is therefore to be distinguished. This combination of circumstances, together with the location of the road, the amount of travel upon it, the length of highway which the town was required to keep in repair, its valuation and the amount available for expenditure upon highways were all proper subjects for consideration by the jury in determining whether a defect existed. *Cammett* v. *Haverhill*, *ante*, 76.

It was also a question of fact whether the defect had existed such a length of time that the town might reasonably have had notice of it. It could not be ruled as a matter of law that two years was insufficient, even giving full force to the contentions of the defendant as to the remoteness of the way and the little travel upon it.

The plaintiff knew the existence of the defect, but she was obliged to use the road as it was her only means of egress from home. Mere knowledge of a defect, even when combined with opportunities for observation afforded by daylight, is not conclusive evidence of negligence. *Cutting* v. *Shelburne*, 193 Mass. 1. *Keith* v. *Worcester & Blackstone Valley Street Railway*, 196 Mass. 478. There was evidence that the plaintiff was conscious of the danger, and had her mind actively directed to its avoidance at the time of the injury. All these and other circumstances were properly left to the consideration of the jury, whose province it was to draw the inference, either of due care or neglect, which in their sound judgment seemed reasonable. The nature of the defect and the testimony of the plaintiff as to her thought and conduct at the time of the accident distinguishes this case from *Gilman* v. *Deerfield*, 15 Gray, 577, *Wilson* v. *Charlestown*, 8 Allen, 137, and *Casey* v. *Fitchburg*, 162 Mass. 321, and bring it rather within the principle of

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Kelly v. *Blackstone*, 147 Mass. 448, *Powers* v. *Boston*, 154 Mass. 60, *Torphy* v. *Fall River*, 188 Mass. 310, and *Campbell* v. *Boston*, 189 Mass. 7.

Exceptions overruled.

SARAH LINDENBAUM *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & others.

JULIUS L. LINDENBAUM *vs.* SAME.

BESSIE ADELMAN *vs.* SAME.

IKE ADELMAN *vs.* SAME.

Suffolk. November 12, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence. Joint Tortfeasors. Street Railway. Evidence, Presumptions and burden of proof, Of identity, Uncontradicted may be disbelieved, Of violation of rules to show negligence. *Witness,* Refreshing recollection. *Practice, Civil,* Verdict, Exceptions.

If a passenger in a car of a corporation operating a street railway is injured by reason of the car being stopped negligently in a place where it is run into negligently by a train of another corporation operating a freight railroad, he can sue the two corporations jointly, his injuries being the result of their combined carelessness in the simultaneous performance of unconnected duties. Following *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575.

In an action against a corporation operating a street railway for injuries incurred, while being transported as a passenger in a car of the defendant, from the car being struck in the rear by a freight train at a switch and pushed around the switch into another street car which had come from the opposite direction and was waiting for a chance to cross the switch, there was evidence that before the accident the freight train was approaching on its track at the rate of about three or four miles an hour, and that the street car from the opposite direction had stopped at the switch to let the train pass over the junction of the tracks. There was no evidence of any obstructions in the street. *Held,* that the jury were warranted in finding that the defendant's motorman, before he crossed the track of the freight railroad, ought to have seen the freight train coming on that track and also the street car approaching from the opposite direction and ought to have known the arrangement of the tracks and switches and have known that if he put his car where he did it might be caught in a trap as it was, that his stopping the car in the wrong place was the cause of the accident, and that it was a question for the jury whether in driving the car to the place where it was stopped he exercised the highest degree of care that was reasonable under the circumstances.

In an action against a corporation operating a street railway for injuries incurred,

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while being transported as a passenger in a car of the defendant, from a collision with a freight train at a switch crossing, where there is no direct evidence as to the rate of speed at which the car in which the plaintiff was being transported was moving before it was stopped in the wrong place and caused the accident, and such rate of speed has to be taken into account in considering whether the motorman ought to have seen a freight train approaching on the intersecting track, in the absence of such direct evidence, it can be assumed that the car was moving at the rate of speed usual at such a place.

In an action for personal injuries, where the plaintiff was treated for her injuries at a relief station of a hospital, a yellow paper and a white card were introduced in evidence without objection containing memoranda relating to the accident and to treatment at the hospital, the yellow paper being stated by a witness to be the accident report and the white card to be the clinical record. At the head of each of these papers was written the name and address of the plaintiff. A physician was called as a witness who testified that at the time of the accident he treated cases at the relief station, and that according to the practice at the relief station the contents of the yellow paper and the name and address at the head of the white card were written when the patient was brought to the station and that the white card accompanied the patient when brought to the accident room for treatment. He testified that all the writing on the white card introduced in evidence, except the name and address at the head, was his. It appeared that the person who wrote the name and address was dead. The witness testified that he did not know the plaintiff or whether he ever treated her and did not know the handwriting of the person who wrote her name and address on the white card. The presiding judge found that the handwriting on the yellow paper and of the plaintiff's name and address on the white card were the same. The plaintiff offered to prove that on the day of the accident there was no other person of her name at the relief station. The judge thereupon allowed the witness to refresh his recollection by the white card, and to testify about treating the person named on the card, and ruled that it was for the jury to say whether the person treated was the plaintiff or not. *Held*, that the ruling was right; there being no question of the right of the witness to refresh his recollection by a memorandum made by him at the time from his personal knowledge, and there being ample evidence that the person named on the card and treated by the witness was the plaintiff.

A jury are not obliged to accept evidence as true because it is uncontradicted.

In an action against a corporation operating a freight railroad, upon the issue whether the engineer of a slowly moving train of the defendant was negligent in not stopping his train before reaching a junction of the freight track with the tracks of a street railway company when cars transporting passengers were approaching from both directions on those tracks, rules of the defendant for the running of its trains were introduced in evidence by the plaintiff against the defendant's exception. The defendant's superintendent who produced the rules testified that some of them had been modified orally and that they were in force except so far as they were modified orally. He also testified that the employees were "supposed to have these rules furnished to them," and that it was the duty of the train master to see that the employees running a train were "furnished with a copy of these rules." He testified, "These rules that are before me apply to the" defendant. *Held*, that this warranted the jury in finding that there were no oral modifications of these rules, or at any rate none that had been put in force.

In an action against a corporation for personal injuries caused by the alleged neg-

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ligence of the defendant's servants, where rules of the defendant alleged to have been violated have been introduced in evidence by the plaintiff against an exception of the defendant relating to their admission as a whole, if it is open to the defendant on the argument of its exception to object that some of the rules admitted had no bearing on the issues then being tried, this objection cannot prevail, because if such rules were immaterial the defendant could not have been harmed by their admission in evidence.

FOUR ACTIONS OF TORT, all against the New York, New Haven and Hartford Railroad Company, the Boston and Northern Street Railway Company and the Union Freight Railroad Company, the actions of Sarah Lindenbaum and Bessie Adelman being for personal injuries incurred on July 9, 1902, when they were passengers on a car of the Boston and Northern Street Railway Company, in the manner described in the opinion, and the other two actions being by their respective husbands for consequential damages suffered by reason of such injuries.

The defendants demurred on the ground that they were not liable jointly. The demurrers were overruled by *Richardson*, J., and the defendants appealed.

The four cases were tried together before *Schofield*, J. The judge ordered a verdict for the New York, New Haven, and Hartford Railroad Company in each of the cases. The jury returned verdicts against the other two defendants, for the plaintiff Sarah Lindenbaum in the sum of $2,300, for the plaintiff Julius Lindenbaum in the sum of $500, for the plaintiff Bessie Adelman in the sum of $500, and for the plaintiff Ike Adelman in the sum of $100. The defendant the Boston and Northern Street Railway Company and the defendant the Union Freight Railroad Company each alleged exceptions, presenting separate bills of exceptions, both of which were allowed by the judge, raising the questions which are considered in the opinion. On page 317 is a reduced copy of the plan referred to in the opinion.

J. L. Hall & D. E. Hall, for the Boston and Northern Street Railway Company and the Union Freight Railroad Company.

C. W. Bartlett & A. Bon, for the plaintiffs.

LORING, J. The two women plaintiffs, whom for convenience we shall speak of as the plaintiffs, were passengers on an outward bound subway car of the Boston and Northern Street

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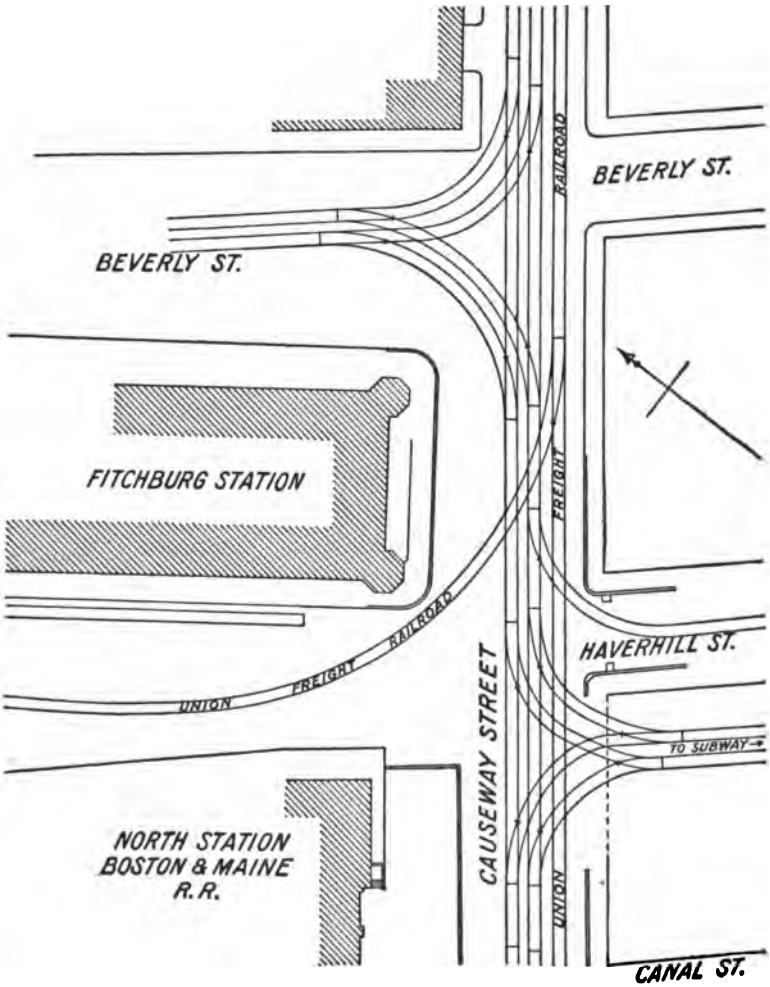
Railway Company, on the evening of July 9, 1902. This car passed from the subway on to Causeway Street until it came to the switch shown on the plan, which was set to throw outbound cars on to Beverly Street. A car on the inbound track, which



had come along Causeway Street, prevented the plaintiffs' car from going into Beverly Street. This inbound car was prevented from going ahead and getting out of the way of the plaintiffs' car by a train on the Union Freight track. The Union Freight train did not stop in time, and ran into the rear end

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of the plaintiffs' car. The plaintiffs' car was pushed around the switch into the inbound car and the two plaintiffs were injured by the collision.

1. The plaintiffs' right to sue the two defendants jointly is settled by the recent case of *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575.

We will deal first with the exceptions taken by the Boston and Northern Street Railway Company.

2. The Boston and Northern Street Railway Company rested on the plaintiffs' evidence so far as liability was concerned.

Its contention is that on the plaintiffs' evidence the cause of the cars coming together as they did was a matter of conjecture (as in *Childs* v. *American Express Co.*, *post*, 337) and that the evidence of the plaintiffs did not go far enough to warrant a finding that the accident was caused by the negligence of the motorman of the defendant.

There was evidence that the engine of the train of the Union Freight Railroad Company, when first seen by the plaintiffs' witnesses, was from fifteen to forty feet away from the rails of the inward bound track on Causeway Street. To make plain which is the inward and which the outward bound track, it is to be understood that the railways using these street railway tracks ran on the right. The freight train was on the track between the Boston and Maine station and the Fitchburg station, and was going toward Causeway Street at the rate of three or four miles an hour. At this time the defendant's car here in question was stopping, or had come to a stop, at the Beverly Street switch, and was blocked by an inward bound car which stood over the switch or so near to it as to prevent the car here in question from turning into Beverly Street. There was no evidence of any obstructions in the street. On this evidence the jury were warranted in finding that the defendant's motorman, in the exercise of the care which this company owed to the plaintiffs, before he crossed the Union Freight track ought to have seen the train coming on the Union Freight track and the inward bound car coming west on the inward track, and ought to have known the arrangement of the tracks and switches, and that if the switch was set for Beverly Street he would be caught in the trap he was caught in.

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3. The exception to the refusal to give the twenty-ninth and thirtieth rulings * asked for must be overruled.

These were two out of forty-three requests for rulings asked for by this defendant (the Boston and Northern Street Railway Company), and one of the forty-three consisted of six subdivisions.

The cause of the accident was the stopping of the defendant's outward car where it did stop. To tell the jury that "the defendant Boston and Northern Street Railway Company had a right to stop its car at any point upon the street," as the defendant requested in the twenty-ninth ruling asked for would have been misleading, and the misleading element is not cured or even helped by the rest of that ruling.

The same is true of the thirtieth ruling asked for.

This defendant now seeks to uphold its exception to the refusal to give these rulings by urging that the accident was caused by this defendant's crossing the Freight Railroad's track and not by stopping its car where it did, as distinguished from crossing the tracks. For after crossing the track it was forced to stop by the Beverly Street switch and the inbound car. We have looked at the four parts of the charge to which counsel for this defendant has referred us in this connection. After a careful examination of these portions of the charge and of the charge as a whole, we are of opinion that the question was left properly to the jury, and that the charge is not open to the objection now urged. The jury were told in substance that to find for the plaintiff they must find that in stopping where they did, including all that led up to making that stop, or, more specifically, in driving the car to the place where it was stopped, the defendant's agents did not exercise the highest degree of care that was reasonable under the circumstances.

There was nothing in these requests, handed in as they were

* 29. The defendant Boston and Northern Street Railway Company had a right to stop its cars at any point upon the street and the jury is not entitled, upon the evidence competent for it to consider, to find said defendant, its agents and servants, negligent in stopping said car at the time and place it did.

30. The jury would not be warranted in finding negligence upon the part of the defendant Boston and Northern Street Railway Company because of the fact that it stopped its car at the time and place it did.

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as two out of forty-three rulings asked for, which called the attention of the judge to the point which it is now urged the defendant wished to have made plain to the jury.

4. The next exception argued is to the refusal to give the rulings asked for numbered 33 a, b and c.*

We are of opinion that the jury were warranted in finding that the Freight Railroad train must have been in sight coming toward the junction of the two tracks before the car in question reached the cross-over, and so near to the outward bound track as to warrant a finding that it was negligence for the defendant's motorman to cross. For that reason 33 a and 33 b were properly refused. In that case 33 c was properly refused as immaterial.

5. The next exception is to the refusal to give ruling 33 f.†

We are of opinion that the presence of the inward bound car across the Beverly Street switch when the outward bound car here in question reached that point, in the absence of evidence of any obstruction, warranted the finding that it would have been seen by the motorman of the outward bound car if he had exercised the care owed by his company to the plaintiffs.

6. After explaining at length that the plaintiff had to prove negligence in the defendant in allowing its outward bound car to be caught in the trap it was caught in, the presiding judge summed up this matter in these words: "As I have said to you, gentlemen, you are to determine what the facts and circumstances were. You are to pass upon the question of the rate

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* 33. Upon all the evidence competent for the jury to consider upon the case against the defendant Boston and Northern Street Railway Company the jury would not be warranted in finding either

a. That the dummy engine so called was in motion when the defendant street railway company's car left the subway station and proceeded along towards the switch, or

b. That it was so near to the track upon which said street car was proceeding as to render it negligent for the servants of said street railway company to propel said car towards the switch, or

c. That any warning of the approach of said Union Freight Railroad Company's train was given to the car by lantern or otherwise.

† 33. Upon all the evidence . . . the jury would not be warranted in finding

f. That the car upon the inbound track was at or upon or so near the switch over which said car was to pass, at the time said car left the subway station, as to render it negligent for said car to be propelled to said switch.

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of speed at which the car of the Boston and Northern was run after coming out of the subway in Causeway Street up to the place where the collision occurred. You are to determine upon the evidence — that is, the evidence as it stood at the time when the defendant the Boston and Northern rested — as to where the freight train of the other defendant, the Union Freight Company, was. You are to decide what the fact was in regard to the relative position of those two objects, the car on one side and the freight train on the other, the speed at which they were moving, and everything relating to their operations down to the time when the collision occurred."

This defendant "excepted to that portion of the charge in which the court submitted the question to the jury to determine the rate of speed at which the car was run from the subway to the point of collision, said defendant claiming that there was no evidence upon that point at all."

Although there was no evidence as to the rate of speed of the outward bound car, the rate of speed of that car had to be taken into account in considering whether the freight train was visible to the motorman, and in the absence of direct evidence on the point the usual rate could be assumed. This portion of the charge meant nothing more than this.

7. The next exception raises a question of evidence.

A police officer testified that he took the plaintiff in the first case, Mrs. Lindenbaum, in an ambulance to the relief station of the city hospital. A record from the city hospital itself of cases treated at the relief station of the hospital was put in evidence without objection on the part of the defendants. It appeared that the city hospital is in Harrison Avenue and that the relief station is in Haymarket Square.

This record was the record of the case of "Sadie Lintenbume." The record was as follows: "Brought to the hospital at 3 minutes past 10 by police ambulance station one, officer Kelliher. Patient lived at 86 Arlington st., Chelsea. Married. Color: white. 40 years of age. Time of accident, 9.50 p. m. Place and circumstances; corner of Causeway and Beverly sts. Officer stated that patient was on an electric car which was struck by a dummy engine of the Union Freight Co. Injury; contusion of elbow. Examined by Dr. Germaine and attended by

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Dr. Germaine. Admitted to the out-patient department and sent home. Record by C. W. Malcom." Later a clerk from the relief station produced a yellow paper and a white card. Upon the yellow paper were these words: "Sadie Lintonbune, living at 86 Arlington Street, Chelsea, received treatment on July 9, 1902, at the Relief Station. Diagnosis: contusion of elbow. About 9.50 P. M., corner of Causeway and Beverly sts., officer states that patient was on an electric car which was struck by a dummy engine of the Union Freight Company. She was brought in by police ambulance, station one; 40 yrs of age and married." This yellow paper was admitted without objection. The clerk who produced the yellow paper testified that it (the yellow paper) was the accident report and the white card the clinical record. The plaintiff then called Dr. Germaine, who testified that in 1902 he treated patients at the relief station. He also testified that all the writing on the white card except the first two lines was his. The first two lines were as follows: "Name, Lintonbune, Sadie. Address, 86 Arlington St." Dr. Germaine further testified that according to the practice of the relief station the yellow paper and the first two lines of the white card are written out when the patient is brought to the station, and the white card accompanies the patient when he or she is brought into the accident room, and that the physician who treats the patient writes on the white card his record of the case. At the time in question it was the duty of one Malcom to write the first two lines of this white card, and that Malcom is now dead. Dr. Germaine testified also that he did not know the plaintiff or whether he ever treated her, and did not know Malcom's handwriting. The presiding judge from an inspection of the yellow paper and the white card was of opinion that the handwriting of the first two lines of the white card was the same as that of the yellow paper. Upon the plaintiff's offering to prove "that there was no other Lindenbaum in that place [the relief station] that day," the judge allowed Dr. Germaine to refresh his recollection by the white card and to testify "about treating the person [named in the white card], and it is for the jury to say whether Sadie Lintonbune was the plaintiff or not." Both defendants took an exception to this ruling.

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The ruling was plainly right. There can be no question of the witness's right to refresh his recollection by a memorandum made by him at the time from his personal knowledge. All that the witness was allowed to testify to was that the person named on that card had traumatic hysteria. There was ample evidence warranting the jury in finding that that person was the plaintiff. All patients come into the accident room of the relief station with such a white card. The only remaining question is: Was the person who came into the treatment room tagged as "Sadie Lintonbune" the plaintiff? We are of opinion that she was. There was evidence that the plaintiff was brought to the relief station that day, and that no other person of a like name was admitted to the relief station on that day. That would have been enough. But in addition the record and yellow paper were admitted in evidence without objection; their admission in evidence was evidence that they related to the plaintiff. The jury were justified, from the contents of the record and of the yellow paper, and from the fact that the yellow paper and the first two lines of the white card were written by the same hand, in finding that the white card also referred to the plaintiff.

This brings us to the exceptions taken by the Union Freight Railroad Company.

8. The difficulty with the argument in support of the exception to the refusal of the judge to direct a verdict for the Union Freight Railroad Company is that although there was no evidence directly contradicting the account of the accident given by their witnesses, the jury had a right to disbelieve their testimony *in toto*. *Twombly* v. *Monroe*, 136 Mass. 464. *Commonwealth* v. *Hyland*, 155 Mass. 7. *Commonwealth* v. *McNeese*, 156 Mass. 231. *Merchants' National Bank* v. *Haverhill Iron Works*, 159 Mass. 158. *Devine* v. *Murphy*, 168 Mass. 249. *Raymond* v. *Worcester*, 172 Mass. 205. *Hankinson* v. *Lynn Gas & Electric Co.* 175 Mass. 271. *Barker* v. *Loring*, 177 Mass. 389, 390. *Palmer* v. *Coyle*, 187 Mass. 136. *Mercantile Guaranty Co.* v. *Hilton*, 191 Mass. 141. *Hamilton* v. *Taylor*, 195 Mass. 68, 71. To the same effect see *Fulton* v. *Andrew*, L. R. 7 H. L. 448, 457. The plaintiffs' evidence which has been stated warranted a finding that the engineer of the engine of the Union Freight

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train ought to have seen the car in which the plaintiffs were passengers and stopped before reaching the junction of the two tracks.

9. The only objection taken to the introduction in evidence of the rules was that the superintendent who produced them testified that some of them had been orally modified, and that they were in force except so far as they were orally modified. Counsel for this defendant stated: "What was in force at that time which was violated or had any bearing upon this accident I certainly should not object to, but it must certainly apply to this time, to this place, and to these circumstances, before I think they are competent." In other words, the defendant's counsel recognized the rule laid down in *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476, and contended that the evidence offered was not brought within it. The same witnesses testified that "The employees are supposed to have these rules furnished to them. It is the duty of our train master to see that the employees running a train on the Union Freight road are furnished with a copy of these rules." Also that "these rules that are before me apply to the Union Freight Railroad."

This warranted a jury in finding that there were no oral modifications of these rules, or at any rate none that had been put in force. The admissibility of all the rules admitted in evidence was dealt with *en bloc*. If it is now open to the defendant to urge that some of those admitted had no bearing on the issues then being tried, they were immaterial and the defendant was not harmed by their being put in evidence.

Exceptions overruled.

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ALBERT C. MENTZER & another *vs.* HUDSON SAVINGS BANK. SAME *vs.* SAME.

Middlesex. November 14, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Landlord and Tenant. Frauds, Statute of.

Where a tenant at will, paying monthly rent on the first day of each month, has received from his landlord a notice in writing to quit on the first day of the second month after the date of the notice, which under R. L. c. 129, § 12, is sufficient to terminate the tenancy, *it is doubtful* whether subsequent negotiations between the parties for the making of a lease in writing for a term to begin on the day of the termination of the tenancy at will, which before that day are broken off without the making of a lease, no occupancy after that day except under the lease being discussed, can constitute a waiver by the landlord of his rights under the notice to quit.

Where a tenancy at will has been terminated by the landlord giving a lease in writing to a third person to take effect upon a day of which the tenant was given reasonable notice, the provisions of R. L. c. 129, § 12, in regard to the termination of a tenancy at will by a notice to quit are immaterial, the landlord having resorted to a different method of termination.

In an action for the alleged breach of a contract to give the plaintiff a lease in writing of certain premises, the defendant set up the statute of frauds. The plaintiff introduced in evidence as a memorandum of the contract an instrument of lease which, with a duplicate, had been sent by the defendant to the plaintiff for his signature, and was left to be signed before a certain hour or not at all. The instrument had on its back an indorsement that it was a lease from the defendant to the plaintiff and that it had been brought "at about 2.30 P. M. with instructions to sign before 3 P. M. or not good." At three o'clock the agent of the defendant called for the lease, and, on learning that it had not been signed, demanded its return. The plaintiff gave him one of the duplicates, but could not give him the other, which was the one put in evidence, because he had sent it to be examined. The next day the plaintiff signed the duplicate of the lease which he had retained and asked the defendant to sign it. The defendant refused to do so. *Held*, that the paper was prepared and used, not as a memorandum, but as a draft of a lease which never was executed as such by the defendant, and that it never was delivered to the plaintiff either as a lease or as a memorandum, and therefore could not satisfy the statute.

TWO ACTIONS, the first of tort and the second of contract, both by Albert C. Mentzer and Cora S. Mentzer, his wife, against the Hudson Savings Bank, the first action, with counts in the nature of trespass *quare clausum* and trover, being for an alleged

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unlawful eviction of the plaintiffs from a store on the first floor of the bank building of the defendant on Main Street in Hudson occupied by the plaintiffs as copartners in the millinery business, as tenants at will of the defendant, and the second action being for the alleged breach by the defendant of a contract to give the plaintiffs a lease of the store in question for a term of three years beginning on June 1, 1905. Writs dated respectively August 21, 1905, and March 15, 1907.

In the first action the defendant's answer was a general denial. In the second action the defendant, in addition to a general denial, alleged that the contract set forth in the declaration was one for the sale of lands, tenements, hereditaments, or of some interest in or concerning them, and that there was no sufficient memorandum or note of the agreement in writing signed by the defendant or by any one thereunto by it lawfully authorized as required by R. L. c. 74.

In the Superior Court the cases were tried together before *Hitchcock*, J.

The plaintiff Albert testified that he and his wife had been copartners in the millinery business since 1897, and in 1902 became tenants of the defendant at the premises in question, occupying them under an oral agreement and paying $50 rent on the first day of each month. The store was in a desirable situation in the centre of the business section of Hudson, and the net profits from the business for the year 1904 were $3,400. During the last week in April, 1905, damage occurred to the stock in trade of the plaintiffs by reason of water escaping from an office overhead, then occupied by a tenant of the defendant, and the plaintiffs rendered a bill to that tenant for the damage. On May 5 following, the plaintiffs received a letter from the defendant's treasurer, saying, "If you will make a bill to the Hudson Savings Bank for the damage done to hats by water and leave the damaged goods with the bank I will send you a check for the amount of your bill rendered to Mr. Boynton."

In consequence of this letter the plaintiffs submitted to the defendant a bill as requested, and on May 9 the plaintiff Albert was present by request at a meeting of the officers of the defendant bank, where there occurred some dispute as to the correctness of the bill rendered. The plaintiff Albert then returned

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to his store and on the same day received from the defendant a check for the amount of the damage claimed by him, together with the following notice:

"Hudson, Mass., May 9, 1905.

"A. C. and C. S. Mentzer

"You are hereby notified to quit and deliver up on the first day of July next the premises now held by you as tenant of Hudson Savings Bank at No. 42 Main Street in this town.

"Hudson Savings Bank,

"By Daniel W. Stratton, Treas."

Four or five days after the delivery of the notice the plaintiff Albert went to the office of the defendant's treasurer and had some talk with him with regard to the occupation of the premises.

On May 29 the plaintiffs received a call from a representative of the defendant, one Cochrane. This was in the store, and both plaintiffs were present. The plaintiff Albert testified, "Mr. Cochrane said he had been chosen a committee of one to settle the matter. And during our conversation — which was leading to the damage, etc. — he said he was satisfied with the damage; that we could have a lease, and there would be no more trouble about it."

On May 31 the plaintiffs received a visit from Cochrane, who came to their store about 9 A. M., bringing with him two copies of a lease. The plaintiff Albert was alone in the store, the other plaintiff being ill. Cochrane then stated to that plaintiff that if the leases were signed by three o'clock in the afternoon it would be all right. That plaintiff replied that he could not have the leases signed at that time, as his wife was ill, and he could not get legal advice as to the meaning of the leases; that he could not sign them before eight o'clock the next morning. Cochrane said, "All right," and went out, leaving the two copies of the lease with that plaintiff, one of which was introduced in evidence. It was dated May 31, 1905, and provided for a term of three years from June 1, 1905, for the rent of $600 a year.

The instrument in evidence was executed under seal by both of the plaintiffs. On the back was the following indorsement:

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"Lease.
"From Hudson Savings Bank
To Albert C. Mentzer et ux
Dated May 31, 1905
Expires May 31, 1908
Recd from Mr. Cochrane
at about 9.30 a. m.
May 31 taken away
in about 15 m
Brought again at
about 2.30 P. M. with
instructions to sign
before 3 P. M. or not
good."

The plaintiff Albert testified that this indorsement on the top was on the instrument when it was delivered to him by Cochrane.

In about twenty minutes Cochrane came back to the plaintiffs' store and stated to the plaintiff Albert that the investment committee of the bank were to have a meeting that afternoon, and that he should like to take the leases to see if they would accept them. The plaintiff Albert asked him if he would return them to him so that he could have them by six o'clock that night, and Cochrane replied that he would. Cochrane then left the plaintiffs' store, taking with him the leases. About 2.30 in the afternoon, Cochrane came back to the plaintiffs' store bringing with him the two leases. He stated at that time that the investment committee of the bank had approved them, but that it wanted them signed by three o'clock or they would lease to other parties. The plaintiff Albert replied that it would be impossible for him to sign the leases without having legal advice, and he wished to have until eight o'clock on the following morning so that he could get advice on them and find out whether it was a right lease for him to sign or not. Cochrane then left the office. He returned at three o'clock and asked the plaintiff Albert, "Are they signed?" That plaintiff replied that they were not signed and could not be before eight o'clock on the following morning, or until he, that plaintiff, could get advice. Cochrane stated that it would be too late, and started to leave the store,

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taking with him the envelope which had contained the leases. He noticed that there was but one lease in the envelope, and asked where the other lease was. The plaintiff Albert replied that he had sent it out to be examined. Cochrane made no further remark and left the store.

On June 5 the plaintiffs wrote to the defendant the following letter:

"Hudson, Mass., June 5, 1905.

"Investment Committee of the
Hudson Saving Bank
. Hudson Mass.

"Gentlemen

"After making several unsuccessful attempts to see Mr. Cochran on June 1 & 2, we have decided to write to the Investment Committee direct and say that after taking council and carefully considering the lease left with us May 31 at 2.30 P. M. by your committee Mr. Cochran, we have decided to sign the same, and wish to say that the one already in our possession is signed, and that we are ready to sign the one held by you at your earliest convenience.

"Yours Very Truly
"A. C. & C. S. Mentzer."

They received in reply a letter or notice from the defendant as follows:

"Hudson, Mass., June 6, 1905.

"A. C. and C. S. Mentzer

"Your favor of June 5 duly received and was placed before the Committee of Investment this afternoon and they instructed me to notify you that a lease has been executed and delivered to other parties to take effect July 1, 1905 of the premises you now occupy and desire that the premises may be entirely vacated so that we can deliver the above to the new tenants on that day. By this you will see that the bank could not give you a lease if they wished and you should make your arrangements accordingly.

"Respectfully yours,
"Daniel W. Stratton, Treas."

The plaintiff Albert further testified that he was unable to consult his own counsel until about seven o'clock on the evening

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of May 31. The plaintiff Albert had no further conference or conversation with the defendant until July 3, when there was some talk between that plaintiff and Stratton, the treasurer of the bank, with regard to the removal of fixtures.

It was agreed by counsel that the defendant executed and delivered a lease of the same premises to one French, dated July 1, 1905, for the term of three years thereafter and that French, acting under this lease, gave a sufficient notice to quit to the plaintiffs, who thereupon surrendered the premises to him on July 3, protesting to the defendant against the expulsion in a letter which was put in evidence.

At the close of the plaintiffs' evidence, including an agreed statement of facts, the judge ruled that upon the evidence presented the plaintiffs were not entitled to recover, and ordered a verdict for the defendant in each of the cases. The plaintiff alleged exceptions.

The case was submitted on briefs.

H. Parker & H. H. Fuller, for the plaintiff.

S. K. Hamilton & T. Eaton, for the defendant.

RUGG, J. The plaintiffs were tenants at will of the defendant, paying monthly rent on the first day of each month. On May 9, 1905, they received from the defendant written notice to quit and deliver up the premises on July 1 following. This was sufficient to terminate the tenancy. R. L. c. 129, § 12. There was some oral discussion later in May between the plaintiffs and a representative of the defendant as to a written lease, the term of which was to begin on July 1. These negotiations never ripened into a binding contract, and were broken off by the defendant on May 31, and no written lease was executed, and there was no evidence that occupancy by the plaintiffs after July 1 was spoken of, except in connection with the written lease. It is doubtful whether these facts in any aspect constitute a waiver of the rights of the defendant under its notice to quit. But the tenancy of the plaintiffs was terminated, and they became tenants at sufferance by virtue of a lease, given by the defendant to a lessee other than the plaintiffs, to take effect on July 1, of which the plaintiffs were given due notice in writing on June 6. *Pratt* v. *Farrar*, 10 Allen, 519. The plaintiffs have no right of action under these circumstances against the land-

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lord. They cannot maintain trespass *quare clausum fregit* because they have neither title nor lawful right to possession against either the landlord or the new tenant. *Low* v. *Elwell*, 121 Mass. 309. The plaintiffs contend that, notwithstanding these familiar principles, the landlord must give them the notice required by R. L. c. 129, § 12, or be liable to them in trespass, if he fails to do so. One conclusive answer to this argument is that this statute does not point out the only method of terminating a tenancy at will. It does not purport to be exclusive of all other remedies. The tenancy at will of the plaintiffs was terminated in another legal way, and they were converted into tenants at sufferance, and the defendant is under no liability to them. *Lash* v. *Ames*, 171 Mass. 487.

The plaintiffs seek to recover for breach of an alleged contract to give them a written lease. There was no evidence of a memorandum in writing as to this contract sufficient to satisfy the statute of frauds. R. L. c. 74, § 1. An unsigned lease, complete in all respects save the signatures of the parties, was handed by an agent of the defendant to one of the plaintiffs, with the oral stipulation that it must be signed by three o'clock in the afternoon, or a lease would be given to some one else. There had been preliminary talk before this time, but some of the essential elements of a lease had not been even referred to, for nothing had been said as to the rent to be reserved. The agent for the defendant called for the leases at three o'clock in the afternoon, ascertained that they were not signed, and took away the only one which the plaintiffs could then give him. Plainly there was no delivery of any writing under the statute. The papers were prepared and used, not as a memorandum but as a contract, and were never executed as such. *Hazard* v. *Day*, 14 Allen, 487. *Sanborn* v. *Sanborn*, 7 Gray, 142. *Parker* v. *Parker*, 1 Gray, 409.

Exceptions overruled.

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MICHAEL McCARTHY *vs.* WILLIE W. MORSE & others.

Suffolk. November 15, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Voluntarily incurring danger in exigency, Violation of ordinance, Proximate cause.

In an action for personal injuries by a foreman in the employ of the water department of a city against the owner of a horse and wagon, whose driver negligently started the horse suddenly, thereby causing the wagon to strike a temporary railing of a temporary bridge and to push it against the plaintiff so as to knock him off the bridge, it appeared that the bridge had been constructed the day before under the direction of the plaintiff at a junction of two public streets, in order to provide a passage for travellers over a trench which had been excavated by men under the charge of the plaintiff, that on each side of the bridge was a succession of light wooden horses about two feet wide at the base and set about two feet in from the edge of the bridge but not attached to it, that these wooden horses were connected by planks nailed on their tops so as to form a continuous line on each side of the bridge, that just before the accident the plaintiff was standing upon a bank of earth near the bridge and saw the defendant's horse and wagon and another horse and wagon trying to pass each other on the bridge headed in opposite directions, that there was loud talk between the drivers and the hubs of the wheels were so situated that the wagons could not pass without coming in collision, that the plaintiff, observing this situation, jumped between the edge of the bridge and the line of wooden horses opposite the horse of the defendant, that it was part of his duty as foreman to keep the bridge free from obstruction and clear for the purpose of travel, particularly in view of its possible use by the fire department, and that in pursuance of this duty he went to move the line of wooden horses in order to make room for the wagons to pass, that, while he was taking hold of a wooden horse to move it, the defendant's driver whipped his horse, causing him to start sharply and suddenly and the wagon to strike the wooden horse and throw it against the plaintiff, knocking him into the trench and causing his injuries. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, who should take into consideration the plaintiff's duty and the exigency under which he acted as well as the obviousness of the danger and the extent of the risk.

In an action for personal injuries by a foreman in the employment of the water department of a city against the owner of a horse and wagon, whose driver negligently started the horse suddenly, thereby causing the wagon to strike the temporary railing of a temporary bridge and push it against the plaintiff so as to knock him off the bridge, it appeared that the bridge had been constructed the day before under the direction of the plaintiff at a junction of two public streets, in order to provide a passage for travellers over a trench which had been excavated by men under the charge of the plaintiff, that an ordinance of the city prohibited the excavation or obstruction of any street of the city without a permit from the superintendent of streets, that the plaintiff received his orders from

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the superintendent of the water department, that a permit for the work had been issued by the superintendent of streets to the water department, but there was evidence that it had expired by its limitation before the day of the accident and had not been renewed. The defendant contended that for this reason the plaintiff was not rightfully on the bridge in the course of his duties and therefore could not recover. *Held*, that, although the violation of the ordinance might be considered by the jury as evidence of negligence, the fact that the plaintiff was engaged upon the work without a permit was not necessarily the direct and proximate cause of his injury nor was he obliged to found his action upon his violation of law, and that it was a question for the jury whether the plaintiff's violation of the ordinance, in view of the other evidence in regard to the plaintiff's conduct, showed such negligence as to preclude him from recovery.

TORT, against Willie W. Morse and three others, copartners doing business under the firm name of Johnson and Company, and George Sanderson, for personal injuries incurred on October 27, 1904, in the manner described in the opinion. Writ dated November 10, 1904.

At the trial in the Superior Court before *Bond*, J., the defendants constituting the firm of Johnson and Company asked the judge for twenty-six rulings, of which nineteen were refused by the judge. The rulings the exceptions to the refusal of which were argued by the defendant were as follows:

2. Upon all the evidence the plaintiff was not in the exercise of due care.

3. Upon all the evidence the plaintiff assumed the risk of injury and cannot recover.

4. There is no sufficient evidence to warrant the jury in finding the defendants constituting Johnson and Company are liable and the plaintiff cannot recover against them.

6. On the pleadings and the proof the plaintiff cannot recover against the defendants constituting Johnson and Company.

8. The plaintiff was guilty of contributory negligence and cannot recover.

19. If the plaintiff knew the situation and the danger of being knocked off the bridge if the team started up against or backed against or was knocked against the wooden horse and voluntarily assumed the risk, then he cannot recover.

21. Upon all the evidence the jury would not be warranted in finding the defendants constituting Johnson and Company liable and the plaintiff cannot recover against them.

22. [There was a violation of the city ordinances in that there

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was no permit from the superintendent of streets in force at the time of the accident for the water department to open and occupy the street and maintain the bridge,] and the plaintiff was not an employee of the city rightfully on the bridge in the course of his duties as such employee.

The part of 22 in brackets was given by the judge, only the last part being refused.

24. The plaintiff voluntarily exposed himself to danger and cannot recover.

25. If the jury find that the plaintiff knew or could by the use of due care have known of the condition of the bridge and the dangers incident to going on to the bridge where he did and the chances of being knocked off by Johnson and Company's team knocking the wooden horse against him as was done here and voluntarily assumed the risk he cannot recover.

The jury returned a verdict for the defendant Sanderson, and against the defendants constituting the firm of Johnson and Company returned a verdict for the plaintiff in the sum of $4,000. The defendants constituting Johnson and Company alleged exceptions.

W. I. Badger, for Johnson and Company.

A. K. Cohen, for the plaintiff.

RUGG, J. This is an action of tort by a foreman in the employ of the water department of the city of Boston, for injuries sustained while attempting to move a wooden railing of a temporary bridge about twenty-four feet wide and thirteen feet long, which spanned a trench eight feet in depth, excavated by men in charge of the plaintiff. The bridge had been erected the day before under the direction of the plaintiff at a junction of two public streets, in order to provide a passage for travellers over the excavation. On each side of the bridge and extending somewhat beyond it at both ends was a railing, which consisted of light wooden horses two feet wide at the base, resting upon but not attached to the floor of the bridge, and about two feet in from its edge, connected by planks nailed on their tops so as to form a continuous line. Either row of wooden horses could be moved by taking hold of it anywhere. Just before the accident the plaintiff, who was standing upon a bank of earth near the trench and bridge, saw two wagons, one belonging to each of the

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defendants, standing close together on the bridge but headed in opposite directions. The evidence was conflicting as to the precise position of each wagon, but there was loud talk between the respective drivers, and the hubs of the two wagons were so situated that they could not pass without collision. There was evidence tending to show that the plaintiff, observing this situation, jumped upon the bridge between its edge and the wooden horses opposite the team of one of the defendants, in order to move the wooden horse nearer to the edge of the bridge, and thus give more room to pass, and that it was a part of his duties as foreman to keep the bridge "free from obstruction and clear for the purpose of travel, particularly with the view of giving free access to the engines of the Boston fire department in case of fire and that in pursuance of this duty he went to move the wooden saw horse . . . for the purpose of allowing the teams to go over the bridge and clear the way for travel," and that the driver nearer the railing backed his horse a few inches three times, in order to allow the other wagon to clear and pass, and that, this end not being attained, both vehicles started together, as the plaintiff was taking hold of the wooden horse to move it so as to make wider the passageway on the bridge, and this driver, looking toward the plaintiff, whipped his horse, causing him to start sharply and suddenly and the wagon to strike the wooden horse and throw it against the plaintiff, thereby knocking him into the trench and causing his injuries.

A verdict was rendered for the plaintiff, and the exceptions of the defendants constituting the firm of Johnson and Company bring the case here. All the exceptions, except those relating to the plaintiff's due care and assumption of risk and the effect of his violation of the city ordinance, are either expressly waived or are treated as waived because not argued.

There was evidence that it was a part of the duty of the plaintiff to see that the bridge was not obstructed, and was kept open for travel. When he saw that two wagons were in imminent danger of locking hubs, and that their drivers were not preserving a calm temper about it, it was not unreasonable for him to assume that a blockade might ensue unless something was done to prevent it, and that if he should widen the roadway a few inches, by moving outward the fence, all trouble might be avoided. It

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was in the line of his duty to bring about this result by any reasonable effort. It cannot be said, as matter of law, that he failed to exercise due care in standing upon the space between the edge of the bridge and the railing in order to move the latter the short distance necessary to enable the wagons to pass. The space was two feet, and the movement outward of the railing a few inches would afford sufficient room in the travelled way. If he had gone inside the rail he would have been in the way of one of the vehicles, and by remaining upon the outside he could be more observant not to move the railing so far as to precipitate it into the trench. Moreover, he could rightfully assume that there would be no such active carelessness on the part of either of the drivers as violently to come in collision with the railing with force sufficient to throw him down. His duty called him to a place of some danger, created, not by his own fault, but by the acts of those, for whom he was in no wise responsible. Whether he was careless or not depends in considerable degree upon the exigency in which he acted, and upon the harm he then ought to have foreseen, and not so much upon what the event has shown was the real danger. Intelligent appreciation of the risk cannot necessarily be predicated upon a mere knowledge of some danger. *Linnehan* v. *Sampson*, 126 Mass. 506. The doctrine of assumption of risk, apart from contract, has no application to cases where there is no adequate understanding of the extent of the exposure to injury. Under these circumstances it was for the jury, under appropriate instructions, to weigh the somewhat conflicting considerations of stress of duty, obviousness of the danger, and extent of the risk.

It was assumed that the work upon which the plaintiff was engaged was being carried on in violation of a city ordinance. Certain sections of an ordinance were introduced in evidence, but there was no penalty clause offered, and therefore it might have been merely directory and not penal. The ordinance prohibited the excavation or obstruction of any street in Boston without a permit from the superintendent of streets. The plaintiff was not himself in charge of a city department, but received his orders from the superintendent of the water department. A permit for this work had been issued, but there was evidence tending to show that it had expired by its own limita-

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tion, and had not been renewed. Under these circumstances the illegal act of the plaintiff in being engaged upon this work without a permit was not necessarily the direct and proximate cause of his injury, nor was he obliged to found his action upon his own violation of law. It was evidence of negligence, which might, or might not, preclude him from recovery, according to the view which the jury took of his conduct respecting the injury as a whole, including his violation of the ordinance. The case falls within the class of which *Newcomb* v. *Boston Protective Department*, 146 Mass. 596, and *Finnegan* v. *Winslow Skate Co.* 189 Mass. 580, are examples, rather than in that of *Banks* v. *Highland Street Railway*, 136 Mass. 485, and *Brunelle* v. *Lowell Electric Light Co.* 188 Mass. 493.

Exceptions overruled.

FREEMAN A. CHILDS *vs.* AMERICAN EXPRESS COMPANY.

Essex. November 20, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Matter of conjecture.

At the trial of an action against an express company to recover for injuries alleged to have been caused to the plaintiff by reason of negligence on the part of an employee of the defendant when removing a trunk from a basement where the plaintiff was employed, it appeared that the trunk was a large one and heavily filled, and that, in removing it from the basement up a flight of stairs, the employee of the defendant used a tackle and fall, the tackle being fastened to a handle of the trunk, that, when the trunk was part way up the stairs, it caught, the handle broke, and the trunk fell upon the plaintiff. Although the plaintiff had as good an opportunity to observe the handle of the trunk as did the defendant's employee, there was no evidence describing it or any tending to show that it was defective or worn or that there was any reason which could have been discovered upon inspection why it could not be used safely in connection with the tackle; nor did it appear how the trunk had caught in its ascent. *Held*, that there was no evidence of negligence on the part of the defendant or its employee which properly could be submitted to the jury, the cause of the accident being left wholly to conjecture.

TORT. Writ in the Superior Court for the county of Essex dated October 4, 1904.

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There was a trial before *White*, J., who, at the close of the evidence introduced on behalf of the plaintiff, directed the jury to return a verdict for the defendant, and the plaintiff excepted. The facts are stated in the opinion.

The case was submitted on briefs.

J. H. Sisk, *W. E. Sisk*, & *R. L. Sisk*, for the plaintiff.

R. W. Boyden, for the defendant.

RUGG, J. The accident, for which this action is brought, occurred in a basement shipping room, where the plaintiff was employed by one Rogers. From this room a staircase six feet wide of twenty-two stairs, the tread of each stair being eighteen inches in width, leads up to a driveway. A tackle and fall were kept on the premises for use in raising articles from the basement by way of the stairs. The day before the accident a large, heavily filled drummer's trunk was brought to the shipping room, and remained there until the next day, when one Melzard, an employee of the defendant, came for it. The plaintiff, at Melzard's request, assisted in moving the trunk to the foot of the stairs. Melzard hooked one part of the tackle in a ring on a post upstairs, fastened one end of the rope on some part of his team, which stood at the head of the stairs, and gave the other end of the rope to the plaintiff, who at Melzard's request fastened it into the handle of the trunk. The plaintiff then returned to work, and shortly afterward heard a noise upstairs, whereupon, without any request and of his own accord he ran to the foot of the stairs, where he saw the trunk apparently caught, and he called to Melzard to stop, and then, as he was turning to go to his work again, the trunk came down, struck him and caused the injury complained of. The handle of the trunk at this time had been torn off.

This evidence fails to disclose any negligence on the part of the defendant. The cause of the accident is left wholly to conjecture. While it is not necessary for the plaintiff to exclude every possibility that the accident may have happened through some cause other than the negligence of the defendant, he is bound to introduce evidence enough to remove the cause from the realm of speculation, and give it a solid foundation upon facts, for the harmful effect of which the defendant is responsible. *Woodall* v. *Boston Elevated Railway*, 192 Mass. 308.

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There is no description of the handle of the trunk, and it does not appear whether it was defective or worn, or whether any reason why it could not be safely used in connection with the tackle could have been discovered upon inspection. The plaintiff himself had quite as good opportunity to observe it as the servant of the defendant, and he proffers no explanation to show that it was not sufficiently strong, or that its weakness could have been observed. It may have been that the highest degree of diligence on the part of the defendant could not have found any ground for apprehension that the handle might not be used in any reasonable way for moving the trunk. It is manifest that other causes than the neglect of the defendant might have caused the trunk to fall. Under these circumstances the plaintiff must bar out by the greater weight of credible evidence the causal connection with his injury of all facts other than the defendant's negligence. The plaintiff failed to produce sufficient evidence to warrant a finding to this effect; hence a verdict against him was ordered rightly. *Harnois* v. *Cutting*, 174 Mass. 398. *McGee* v. *Boston Elevated Railway*, 187 Mass. 569. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572. *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. *Saxe* v. *Walworth Manuf. Co.* 191 Mass. 338.

Exceptions overruled.

NORTH END SAVINGS BANK *vs.* EPHRAIM SNOW, JR. & another.

Norfolk. December 6, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Mortgage. Surety. Subrogation. Bills and Notes.

The owner of certain real estate conveyed it in mortgage to secure the payment of a note signed by him, and then, before the note became due, conveyed the equity of redemption to one who was not liable upon the note, with whom, after the note became due, the mortgagee made an agreement not to foreclose the mortgage so long as the interest was paid regularly, by reason of which there was delay in foreclosure and the real estate, which, when the note became due, was of sufficient value to satisfy it upon foreclosure proceedings, depreciated until

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its value fell short of the amount due on the note. In an action by the mortgagee against the mortgagor upon the mortgage note, it was *held*, that the agreement of the mortgagee with the grantee of the equity of redemption to extend the time of payment of the note was valid and binding upon the plaintiff and operated to release the mortgagor to the amount by which, because of such extension, the value of the security fell short of the amount due on the note.

CONTRACT upon a promissory note. Writ in the Superior Court for the county of Norfolk dated May 12, 1905.

There was a trial before *Hardy*, J., upon agreed facts. As stated in the opinion, the presiding judge refused to allow the defendants to prove further facts, which were offered by him, on the ground that they were immaterial, directed a verdict for the plaintiff, and the defendants excepted.

E. F. McClennen, for the defendants.

J. H. Colby, for the plaintiff.

MORTON, J. This is an action on a mortgage note by the mortgagee against the mortgagors. Certain facts were agreed, reserving the question of their materiality, and reserving also the right of the parties to introduce further evidence. The defendants offered to show certain other facts in addition to those agreed upon. The presiding judge ruled that the facts, if shown, would be immaterial, and excluded the evidence thus offered. No other evidence was introduced than that contained in the facts agreed upon, and the presiding judge directed a verdict for the plaintiff for the amount of the note and interest. The case is here on exceptions by the defendants to the rulings and direction thus made. Exceptions were also taken by the defendants to the refusal of the presiding judge to order the plaintiff's president to answer certain interrogatories filed by the defendants, but they have not been argued, and we, therefore, treat them as waived.

The mortgage was dated March 2, 1897, and was payable in three years from date with interest payable semi-annually on the first days of June and December "at the rate of five per cent per annum during said term and for such further time as said principal sum or any part thereof shall remain unpaid." The title to the property was in the female defendant. In November, 1898, the defendants conveyed the equity, subject to the mortgage, to one Finkelstein and one Friedman. Thereafter Finkelstein and Friedman paid the interest until June 10,

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1904. No demand for payment of the mortgage was made either upon Finkelstein and Friedman or the defendants until December 27, 1904. The defendants offered to show that, after the note came due, the plaintiff agreed with Finkelstein and Friedman that, if they would continue to pay interest on the note according to the terms thereof, it would not foreclose the mortgage so long as the interest was regularly paid, and that Finkelstein and Friedman agreed to this and paid the interest under this agreement down to and including June 10, 1904. The defendants also offered to show, in substance, that the property had greatly depreciated since the mortgage came due, and that it would not bring enough under foreclosure proceedings to pay the note.

After the conveyance of the equity subject to the mortgage, the relation of the defendants to the plaintiff became in a sense that of sureties, and if they had paid the note they would have been entitled to be subrogated to the mortgage notwithstanding they were the mortgagors. Payment of the note by them under such circumstances would not have operated to discharge and extinguish the debt as to them unless so intended. *Pratt* v. *Buckley*, 175 Mass. 115. *Pearson* v. *Bailey*, 180 Mass. 229. *Franklin Savings Bank* v. *Cochrane*, 182 Mass. 586. *Rice* v. *Sanders*, 152 Mass. 108. *Murray* v. *Marshall*, 94 N. Y. 611. *Spencer* v. *Spencer*, 95 N. Y. 353. *Travers* v. *Dorr*, 60 Minn. 173. The land constituted the primary fund and they were entitled to have it applied in payment of the mortgage debt. Any valid and binding agreement, therefore, between the plaintiff and Finkelstein and Friedman, affecting the right of foreclosure by extending the time for the payment of the mortgage debt, would operate to release the defendants to the amount to which by reason of such extension the security fell short of the amount due on the note. Ordinarily a valid and binding agreement for extension between the principal and his creditor without the consent of the surety will discharge the latter entirely. But in a case like the present the mortgagors are not regarded as being, in the strict sense of the word, sureties, but as being such only in the sense that they are entitled to have the security regarded as the primary fund for the payment of the debt and it is only so far as that is affected that they can complain. The point now presented did not arise in *Shepherd*

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v. *May*, 115 U. S. 505. The question then is whether the agreement for extension, which the defendants offered to show was entered into between the plaintiff and Finkelstein and Friedman, was a valid and binding one. We do not see why upon the defendants' offer it was not. Finkelstein and Friedman were not personally liable for the mortgage debt. The offer was to show that, in consideration of the promise by Finkelstein and Friedman to pay the interest, the plaintiff agreed not to foreclose so long as the interest was paid. This constituted a valid and binding agreement between the plaintiff and Finkelstein and Friedman and would have prevented the plaintiff from foreclosing the mortgage so long as the interest was paid. It is true, as the plaintiff contends, that a mortgagee may pursue concurrently his remedies on the note and mortgage. But this is subject, of course, to the provision that he has done nothing to disable him from doing so. It is true, also, that mere inaction or delay on the part of the creditor in the enforcement of his rights against the principal debtor will not discharge the surety. But here, according to the offer, there was a valid and binding agreement for delay. Still further it is true that if Finkelstein and Friedman had been the principals on the note and the defendants had been sureties the agreement would not have operated to discharge the defendants because it would have been invalid for want of consideration. But as already observed Finkelstein and Friedman were not personally liable for the mortgage debt and the agreement for delay between them and the plaintiff was valid and binding. No such question as is here presented arose in *Tucker* v. *Crowley*, 127 Mass. 400, on which the plaintiff relies, and the result is that we think that the exceptions must be sustained.

So ordered.

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EDWARD F. SEARLES & others, trustees, *vs.* IRENE E. FIELES & others.

Essex. December 10, 1907. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Devise and Legacy. Trust. Words, "Necessary provisions."

A testator's family for several years before his death had consisted of himself, his wife, who was deaf and infirm, a first cousin named Mary, a second cousin Irene and Irene's daughter, all being supported and maintained by him without discrimination. Mary was interested with him in a retail dry goods business, and both she and Irene worked in his store and also devoted themselves, without compensation excepting their living, to the care of the household and of the testator's wife. By his will, the testator placed practically all of his property in trust and, among other things, gave directions to his trustee "that my homestead with its appurtenances and furniture and necessary provisions be held for the use of my wife and other members of my family, namely," Mary, Irene and Irene's daughter, "so long as any one of them shall be living and shall desire to occupy the same." The testator's wife and Mary died after the testator. On a bill in equity brought by the trustee for instructions, it was *held*, that it was the duty of the trustee to keep the homestead and its appurtenances in repair and to maintain the furniture by repair and renewal in as good condition, for the use of the two remaining members of the family, as it was in at the time of the testator's death, and to furnish to them necessary provisions to supply food but not to pay their individual expenses nor the other expenses of housekeeping or of maintaining a home.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Essex July 5, 1907, by trustees under the will of Artemas W. Stearns, for instructions.

There was a hearing upon the bill, answers and an agreed statement of facts before *Hammond*, J., who reserved the case for determination by the full court.

From the agreed statement the following facts appeared as to the relations of the members of the family of the testator to one another, mentioned in the third paragraph of the opinion. The testator at the time of his death was eighty years of age. He left a widow who was several years older than he and who had, for many years, been deaf and infirm, requiring constant care, attendance and companionship. No children were ever born of this marriage. Mary W. Truell, who was a first cousin of the testator, lived in his family over forty years, and Irene E.

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Fieles, who was a second cousin of the testator, had lived in the family continuously for twenty-four years, except for a year or so, and her daughter, Mary I., was born there. The testator engaged in the retail dry goods business in Lawrence for forty-two years, and, at the time of his death, Mary W. Truell with two others beside the testator were a partnership that was carrying on the business, the testator owning a seventy-six per cent interest and Mary W. Truell's interest being worth $2,300. Mary W. Truell worked in the store from the time she came to Lawrence until she was admitted to the partnership, and Irene E. Fieles worked in the store for many years. Mary W. Truell, Irene E. Fieles and her daughter, the testator and his wife all lived together as one family, the entire expenses of the household, including the personal expenses of each member thereof, being borne by the testator. He maintained the family in a manner befitting a prudent man of his means and estate. The various members of the family were maintained as a whole without discrimination or difference. At the time of the death of the testator, Mary W. Truell was possessed of nothing except her interest in the partnership, and Irene E. Fieles was possessed of no money or estate whatever. For many years Mary W. Truell and Irene E. Fieles had devoted themselves to the care of the homestead and household and of the testator's wife, and all this was done by them without compensation, except for their living as aforesaid. Mary W. Truell died after the testator and before this bill was filed.

The will, after directing the payment of debts and funeral expenses and expenses of administration, and making provision for a monument, placed the entire residue of the testator's property in trust, the first direction to the trustees being that mentioned in the opinion.

Other facts are stated in the opinion.

The case was submitted on briefs.

C. H. Cox, for the respondents.

D. Malone, Attorney General, *& F. T. Field*, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. This is a bill for instructions, and the only question presented by it is what is the meaning of the provision for the beneficiaries in a clause of the will of Artemas

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W. Stearns late of Lawrence, deceased, which is as follows: "First, I direct that my homestead with its appurtenances and furniture and necessary provisions be held for the use of my wife and other members of my family, namely, Mary W. Truell, Irene E. Fieles and Mary I. Fieles, so long as any one of them shall be living and shall desire to occupy the same." The connection in which the word "provisions" is used makes it plain that the testator did not think of it as the plural of provision, in its meaning of an act of providing, so that it should be construed as referring to acts making provision for the wants of the family. It is used in connection with other words which all signify kinds of property, and it seems plain that this was intended as a general designation of a certain kind of property. It is said in *Commonwealth* v. *Reid*, 175 Mass. 325, 329, that "the word 'provisions' means food, victuals, fare, provender." See *Commonwealth* v. *Caldwell*, 190 Mass. 355. The difficult question in the case is whether the clause means that the members of the family are to have the homestead and the furniture and the provisions on hand at the time of the testator's death, to use as they were until worn out or consumed, except as they should be kept in repair at their own expense, or whether the direction to the trustees that these several articles be held for the use of the testator's wife and other members of his family was equivalent to a direction that they should be maintained by the trustees for this use. These are essentials and appointments which constitute the material features of a home. The thought of continuing a home for the testator's family seems to have suggested the words.

The fact that there is no express provision for an expenditure of money for this purpose favors the contention of the Attorney General. On the other hand, there is much to support the opposite contention. The words "necessary provisions" indicate that the provisions referred to were not such as might happen to be on hand at the time of the testator's death, but such as might be needed for the support of the family afterward. If the word "held" be taken alone and construed narrowly, it seems to refer only to property which the testator left at his decease. But the words "held for the use of" in connection with the term "necessary provisions"

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accompanying the words "homestead and furniture," which naturally suggest a large degree of permanence, carry with them the idea of continued action and maintenance by the trustees.

When we consider the close relations of the members of this family to one another, and the long and faithful service of the others to the testator's invalid wife, and their dependence upon the testator's bounty for their support after his death, we discover strong indications of an intention on his part to have the house and furniture maintained for their benefit, with the necessary provisions. The fact that the income left to them was not enough to maintain them in the manner in which they had lived, and the further fact, under conditions existing since the death of Mary W. Truell and the testator's wife, that Mrs. Fieles's share of the income would not enable her to maintain the home and support herself comfortably if all the expenses were borne by her, emphasize the suggestion that these articles of property, to be "held for the use of" the family, are to be maintained for their use. In this respect the case has some analogies to *Denfield, petitioner*, 156 Mass. 265.

It is the duty of the trustees to keep the homestead and its appurtenances in repair, and to maintain the furniture by repair or renewal, so as to keep it in as good condition as it was in at the time of the testator's death, and to furnish necessary provisions to supply food for the use of the two remaining members of the family. They are not called upon to do more than to maintain and supply the articles of property mentioned in this clause of the will. The individual expenses of the two surviving members of the family are not to be paid by the estate, nor are the other expenses of housekeeping and of maintaining a home to be so paid.

We infer that the income will be more than enough to make these necessary payments, and that there is no occasion to consider whether such payments could be made from the principal fund.

So ordered.

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SARAH M. MITCHELL *vs.* WILLIAM H. THOMAS.

Suffolk. January 6, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Statute of Limitations. Evidence, Of payment. *Bills and Notes. Payment.*

At the trial of an action upon a promissory note by the payee against the maker, the defence relied upon was that the period of limitation had passed. Upon the back of the note was indorsed a payment with a date within a time less than the statutory period before the action was brought, and the plaintiff, subject to exception by the defendant, testified that the indorsement was written upon the note by him in the presence of the defendant, who saw it made and who at the same time paid to the plaintiff the amount stated in the indorsement to have been paid. The defendant contended that the case was within the provisions of R. L. c. 202, § 13, that no indorsement of a payment of the principal or interest of a note, written on the note by the party to whom such payment had been made, should be sufficient proof of the payment to take the case out of the provision of the statute of limitations. *Held*, that, there being other evidence sufficient to prove the payment besides the indorsement, the statute did not apply.

CONTRACT upon four promissory notes. Writ in the Municipal Court of the City of Boston dated May 24, 1904.

On appeal to the Superior Court, the case was tried before *Bishop*, J. The notes were dated, respectively, June 8 and June 13, 1893, September 28, 1895, and February 28, 1896. The defendant denied the signatures and set up the statute of limitations. The plaintiff testified that, previous to June 1, 1898, she had repeatedly asked the defendant to pay the notes, and that he always had put her off; that, he having said he wanted to see the notes, she carried them down to his place of business on June 1, 1898, and asked him to pay a little on them; that he gave her $5, and that she sat down at the desk in his presence and indorsed $1 on three of the notes and $2 on the other, and that he saw her do it. The defendant objected to the admission of all evidence concerning the payment of $5 and its indorsement upon the notes, on the ground that, "Where a note comes within the statute of limitations, it is not permitted to the plaintiff to testify to any payment made," and excepted to the ruling of the presiding judge admitting such evidence.

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The evidence of the defendant tended to controvert that of the plaintiff, and, at the close of the evidence, he asked the presiding judge to rule that upon all the evidence a verdict should be given for the defendant; and that "part payment of a note cannot be proved by an indorsement made by the party herself, and, there being no other evidence of payment in this case, that the verdict should be for the defendant." The presiding judge refused to give the rulings requested, but did instruct the jury that the indorsements on the backs of the notes were not sufficient evidence to take the notes out of the provisions of the statute, and, that, if the case rested upon the indorsements, they could not find for the plaintiff; but that that was not the whole of the case; that the ground of recovery, if they found the plaintiff ought to recover, was the testimony as to payment as stated by the plaintiff in her evidence, and that the case rested upon her testimony as against the testimony for the defendant.

The jury found for the plaintiff, and the defendant alleged exceptions.

The case was submitted on briefs.

J. F. O'Connell & W. F. McNamara, for the defendant.

F. S. Harlow, for the plaintiff.

RUGG, J. The defendant has argued that testimony by the payee of notes, to the effect that the maker made a certain payment to her before the statute of limitations had run, and that, thereupon, in the maker's presence, the payee wrote an indorsement of payment on the back of each of the notes in suit, and that he then promised to pay the balance due, was inadmissible. There is nothing in this contention. Under R. L. c. 202, §13, a mere indorsement of payment by the holder of a note, standing by itself and without corroboration from circumstances or other evidence, is not sufficient to lift the bar of the statute of limitations. But this statute has no application where there is evidence outside the indorsement. *Sibley* v. *Phelps*, 6 Cush. 172. The plaintiff's testimony as to the circumstances, under which the payment and the indorsements were made, and the accompanying conversation, was ample to show a payment made within six years by the defendant. The rulings requested by the defendant were properly refused, and those given by the Superior Court aptly stated the law applicable to the issues and the evi-

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dence. The case is so clear that the exceptions appear frivolous. Therefore, double costs are imposed, and interest at the rate of twelve per cent a year upon the amount found due as debt, from the time when the exceptions were allowed, and it is

So ordered.

ANNIE B. MASON *vs.* INTERCOLONIAL RAILWAY OF CANADA & trustees.

Suffolk. January 6, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Suggestion by *amicus curiæ,* Motion to dismiss. *Jurisdiction. Foreign Sovereign. Intercolonial Railway of Canada.*

In an action of tort begun by trustee process in the Superior Court, the defendant did not appear, but a member of the bar of this Commonwealth, as a friend of the court, brought before the court a suggestion that the action be dismissed on the ground that the railroad described in the writ as the defendant was the property of the King of the United Kingdom of Great Britain and Ireland; and the procedure received this court's approval.

On an appeal by the plaintiff from an order of the Superior Court dismissing an action of tort against a defendant, named in the writ as the Intercolonial Railway of Canada, for personal injuries alleged to have been received by the plaintiff upon that railway in Canada, it appeared that the railway was not a corporation, that no private individual or corporation had any interest in it, that it was owned and operated by the King of the United Kingdom of Great Britain and Ireland through his government of Canada for the public purposes of Canada, that all the income and revenue arising from its operation were by law appropriated to a fund upon which all the expenses of the government of Canada are chargeable, and that the cost of maintenance and operation of the railway were provided for by appropriation of the parliament of Canada. *Held,* that the action rightly was dismissed, since the courts of this Commonwealth have no jurisdiction to proceed against the public property of a sovereign of a foreign State.

TORT for personal injuries received by the plaintiff while a passenger on the Intercolonial Railway of Canada at Moncton, New Brunswick. Writ in the Superior Court for the county of Suffolk, dated January 18, 1907.

Several corporations and one individual were summoned as trustees, who answered that they had in their possession effects and credits belonging to the Intercolonial Railway, which they

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would hold subject to the process served upon them if the court should be of opinion that it had jurisdiction to entertain the action. In each answer was included a copy of a letter of Messrs. Russell and Russell to the trustees stating that the funds held by the trustee to the credit of the Intercolonial Railway were "funds of the British Government and therefore in no way attachable or subject to detention by process of any court in this country."

There also was filed a paper entitled "Appearance, Suggestion and Motion to dismiss Action," which in part read as follows:

"And now comes Arthur H. Russell, counsellor at law, and a member of the bar of this court, and in the above entitled cause respectfully shows to the court that there exists no such body corporate as is described under the name and title of the Intercolonial Railway of Canada, as defendant in this action; and further, he respectfully suggests and shows to the court that the line of railway described in the writ and declaration in this action as the Intercolonial Railway of Canada is in fact the property of the British Crown and is owned and operated by His Britannic Majesty in the right of his government of Canada; . . . wherefore the said Arthur H. Russell respectfully suggests to the court that it is in derogation of the sovereignty and independence of His Britannic Majesty and contrary to the law and comity of nations that funds belonging to His Britannic Majesty should be withheld by a process of this court or that this court should take jurisdiction of this action, and he moves that the said action be forthwith dismissed."

There was a hearing before *Fessenden*, J., who made an order in the following language: "Motion allowed after hearing and action ordered dismissed." The plaintiff appealed.

N. Wolfman, for the plaintiff.

A. H. Russell, appeared as *amicus curiae*.

KNOWLTON, C. J. This is an action brought by a trustee process to recover damages for personal injuries. The defendant has not appeared, but a member of our bar, as a friend of the court, following the practice approved by Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 738, 870, has brought before the court a suggestion that the action be dismissed, and

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also an affidavit of the deputy of the Minister of Justice and Attorney General of Canada, including a copy of the "Act respecting Government Railways," from which it appears that the so called defendant, the Intercolonial Railway of Canada, is the property of His Majesty, Edward VII., King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual or corporation has any interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the king, through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. Such moneys, when collected, are deposited to the credit of the minister of finance and register general of Canada, and carried to the credit of the consolidated revenue fund, which fund is appropriated to the public debt and service of Canada. The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. See also *The Queen* v. *McLeod*, 8 Canada Supreme Court, 1, 23.

Upon this suggestion the question at once arises whether the court has jurisdiction of a suit which is virtually against the king of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in *Briggs* v. *Lightboats*, 11 Allen, 157, and, after an exhaustive review of the

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authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case: "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character." In *Schooner Exchange* v. *M'Faddon*, 7 Cranch, 116, Chief Justice Marshall gives a very clearly reasoned statement of the principles which control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign State who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases: "One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another State is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171, and *DeHaber* v. *Queen of Portugal*, 17 Q. B. 171, 196. It was again applied in *The Constitution*, L. R. 4 P. D. 39, and also in *The Parlement Belge*, L. R. 5 P. D. 197, where an elaborate review of the decisions is given by *Brett*, L. J., who says on page 214: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the inde-

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pendence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In *Vavasseur* v. *Krupp*, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows: "This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the State of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign." In *Young* v. *The Scotia*, [1903] A. C. 501, there is an elaborate discussion of the exemption of public property from process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See also the very recent case of *The Jassy*, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases.

Action dismissed.

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PALATINE INSURANCE COMPANY OF LONDON vs. ANNIE KEHOE.

Suffolk. January 7, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Insurance, Fire. *Contract*, Construction. *Deceit*. *Fraud*. *Payment*.

A rider on a policy of fire insurance, in the Massachusetts standard form, on household furniture and other articles of personal property in a certain house in Revere, giving the insured permission to remove the insured property to a certain building in Randolph, provided further, "This policy to attach and cover the same in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only." A portion of the insured property was destroyed by fire after it had been removed from the house in which it was when the policy was issued and while it was stored temporarily in another building with a view to its subsequent removal to Randolph. *Held*, that the property thus destroyed was not covered by the policy, as the rider did not insure it in transit.

In an action by a fire insurance company for deceit to recover as damages money paid by it to the defendant on a loss of household furniture and other articles of personal property under a policy which insured the property in a certain house in Revere, giving the insured permission to remove it to a certain building in Randolph and covering the property "in both locations during removal in proportion as the value in each location shall bear to the value in both," providing that after removal the policy should cover the property in the new location only, there was evidence tending to show that an important part of the property was destroyed by fire after having been removed from the house in which it was when the policy was issued and while it was stored temporarily in another building with a view to its subsequent removal to Randolph. The presiding judge, subject to the plaintiff's exception, instructed the jury that the part of the property thus stored temporarily while it was in process of being moved was covered by the policy. This instruction was erroneous, as the policy did not cover the property while in transit. There was evidence tending to show a fraudulent representation made by the defendant to the plaintiff, after the fire and before the settlement, that the property had not been removed from the place where it was when the policy was issued and that most of the property was in that place at the time of the fire, a small portion only having been removed to Randolph. *Held*, that the erroneous instruction was important as bearing upon the materiality of the fraudulent representation, if there was one, and therefore that the exception to the instruction should be sustained.

A payment of a loss by a fire insurance company, which was procured by fraudulent representations of the insured in regard to material matters, in no way precludes the company from avoiding the settlement thus procured by fraud.

TORT by a fire insurance company for deceit, to recover back the sum of $844.90 paid to the defendant on a loss of household furniture and other articles of personal property under a policy

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issued by the plaintiff when the property described in it was in a frame apartment house with stores underneath on the easterly side of Ocean Avenue in Revere known as the Irving Cottage. Writ in the Municipal Court of the City of Boston dated September 19, 1905.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. It was agreed that the policy was in the Massachusetts standard form and had attached to it the rider which is quoted in the opinion, and that the property described in the policy was destroyed by fire on June 4, 1905.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, raising certain questions, of which those that are material are stated in the opinion.

The case was submitted on briefs.

R. D. Ware, for the plaintiff.

H. Dunham, for the defendant.

KNOWLTON, C. J. The plaintiff contended that a part of the property included in the policy was not covered by it at the time of the fire, because it had been removed from the building in which it was insured to another building near by, which was burned in the same conflagration.

Upon the policy a rider had been attached, as follows: "Permission is hereby given the assured to remove the within insured property to frame dwelling building situate east side South Main Street, between Union and Maple Sts. in Randolph Mass. This policy to attach and cover the same in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only." There was evidence tending to show that an important part of the property had been removed and stored temporarily in another building, with a view to the subsequent removal of it to Randolph. As to this the judge instructed the jury as follows: "Now as to any articles which were moved from the Irving Cottage, if any were, and temporarily placed in another building that being a part of the transmission of the property from the Irving Cottage to Randolph within any reasonable grounds, the policy of insurance might cover such property in its transmission from the one place to another. . . . It must appear that if any portion of the property

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was placed temporarily in another building while it was in process of being moved, the placing of that property there was for a very short period of time only; that it was temporarily there, and that it was not to remain there and did not remain there under the protection of that building." This was erroneous. In *Goodhue* v. *Hartford Ins. Co.* 184 Mass. 41, it was decided, under a contract in substantially the same terms as the one now before us, that goods which were burned in railroad cars while being removed were not covered by the policy. Other cases involving the same general principle are *Bradbury* v. *Fire Ins. Association*, 80 Maine, 396; *English* v. *Franklin Ins. Co.* 55 Mich. 273; *Lycoming Ins. Co.* v. *Updegraff*, 40 Penn. St. 311; *Hartford Ins. Co.* v. *Farrish*, 73 Ill. 166; *Mawhinney* v. *Southern Ins. Co.* 98 Cal. 184.

There was evidence tending to show a fraudulent representation by the defendant to the plaintiff that this property had not been removed from the place where it was when the policy was issued, and that most of the property was in that place at the time of the fire, a small portion only having been removed to Randolph. The instruction just quoted was important as bearing upon the materiality of the fraudulent representation, if there was a fraudulent representation.

At the request of the defendant the judge also instructed the jury that "payment by the plaintiff to the defendant in this action is a waiver of all breaches of the insurance policy on the part of the defendant and every defence which might have been made to the policy on which said payment was made except for such waiver." This leaves out of consideration the fact that, upon the evidence, the payment might have been procured by fraudulent representations of the defendant in regard to material matters. If it was so procured the plaintiff, on discovery, might avoid the effect of it, and it would not constitute a waiver. In *Berkshire Ins. Co.* v. *Sturgis*, 13 Gray, 177, relied on by the defendant, there is nothing that precludes one from avoiding a settlement procured by fraud. This instruction was erroneous.

As bearing upon one branch of the case the assignment of the policy to the defendant by her husband,* after the payment to

* The defendant's husband testified that he executed this assignment as of the date of the policy at the request of the plaintiff's agent about a week

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her by the plaintiff, with the assent of the plaintiff's agents indorsed upon the policy, was rightly admitted.

The other questions of evidence presented by the bill of exceptions are not likely to arise in the same form at another trial, and we do not think it necessary to consider them.

Exceptions sustained.

ARTHUR E. BURR, trustee, *vs.* MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED & claimants.

Suffolk. January 7, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Commonwealth. Massachusetts School for the Feeble-minded. Contract, Construction. *Words*, "Owner."

The provision of R. L. c. 6, § 77, that "Officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair" applies to a contract made by the Massachusetts School for the Feeble-Minded under statutory authority for the construction of a boys' and girls' home on land of the Commonwealth to be paid for by money furnished by the Commonwealth, the Massachusetts School for the Feeble-Minded being a corporation, through which the Commonwealth carries on charitable work, which in making such a contract acts as an agent contracting in behalf of the Commonwealth within the meaning of the statute.

The Massachusetts School for the Feeble-Minded under statutory authority made a contract in behalf of the Commonwealth for the construction of a boys' and girls' home on land of the Commonwealth, and as a compliance with the requirement of R. L. c. 6, § 77, inserted in the contract the following provision: "If at any time there shall be evidence of any lien or claim for which, if established, the owner of said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indem-

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after the money had been paid to the defendant, because investigation by the plaintiff had shown that he and not his wife was the insured. The plaintiff excepted to the admission of the assignment in evidence. The defendant contended that the procuring by the plaintiff of this assignment and indorsing the plaintiff's assent to it upon the policy was evidence of ratification by the plaintiff of the payment made to the defendant. This view is sustained by the court.

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nify him against such lien or claim." Under this clause the Commonwealth retained a sum equal to twenty per cent of the amount due to the contractor for labor and materials furnished under the contract, and sworn statements of claims against this fund were filed within sixty days after the completion of the work as required by the statute. The trustee in bankruptcy of the contractor brought an action against the Massachusetts School for the Feeble-Minded for the money thus retained, contending that, as the Commonwealth was the "owner" of the premises, no lien or claim had been or could be established against it, to bring the claims within the clause of the contract. *Held*, that the word "owner" was used in the sense of "an ordinary owner" and that the claims referred to were those "for which, if established, an ordinary owner of said premises might become liable," thus giving the provision of the contract effect and enforcing the statute.

A contract made with an officer or agent of the Commonwealth for the construction or repair of public buildings or other public works, which in compliance with the requirement of R. L. c. 6, § 77, provides security for the payment by the contractor for labor and materials by the retention of a certain proportion of any payment due to the contractor, gives to a person, who has furnished such labor or materials and has filed a sworn statement of his claim within sixty days after the completion of the work, an equitable interest in the fund held by the agent of the Commonwealth as security.

KNOWLTON, C. J. The plaintiff is the trustee in bankruptcy of the H. P. Cummings Company, a corporation, and he brings this action against the Massachusetts School for the Feeble-Minded, to recover a balance due upon a contract for the construction of the "Boys' and Girls' Home at Waverly." This contract was made under the authority of the St. 1905, c. 444, the money paid for the building was furnished to the Massachusetts School for the Feeble-Minded by the Commonwealth, and the balance alleged to be due on the contract has been paid into court under an answer by way of interpleader, setting up an equitable defence in favor of certain claimants. This balance, which amounts to $6,408.94, is twenty per cent of the value of the labor and materials furnished under the contract, which was retained under Article IX. of the contract. The question is whether certain parties who were employed by the H. P. Cummings Company to furnish labor and materials for the construction of the building, and who have not been paid, and who appeared in court as claimants, are entitled in equity to be paid out of this fund.

The R. L. c. 6, § 77, is as follows: "Officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain

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sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents, a sworn statement of his claim, within sixty days after the completion of the work." In Article IX. of the contract is the following provision: "If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim." The statute and this provision are to be considered together in determining the rights of the parties. Each of the claimants filed with the trustees of the Massachusetts School for the Feeble-Minded, within sixty days after the completion of the work, a sworn statement of his claim for labor performed or furnished, and for materials used in the construction of the buildings.

The first question is whether the Massachusetts School for the Feeble-Minded was an officer or agent that contracted in behalf of the Commonwealth. The judge before whom the case was tried found and ruled that it was, and we think it plain that this decision was correct. The buildings were erected on land of the Commonwealth, and the money to be paid for them was furnished by the Commonwealth. The relations of this institution to the Commonwealth are shown in part by the R. L. c. 87, §§ 113 to 123. The salaries and wages of all the officers and employees, and all bills for supplies and other expenses of the institution were paid from the treasury of the Commonwealth. R. L. c. 87, § 127. Acts and resolves relating to the subject, passed almost every year for many years, are referred to in the agreed statement of facts. This is a corporation through which the Commonwealth carries on charitable work, and in reference to these buildings it was an agent contracting in behalf of the Commonwealth.

It was its duty, under the statute, in making the contract, to obtain security for the payment of these claimants. The statute was enacted to give contractors, furnishing labor and materials

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in the erection of a building owned by the Commonwealth, security equivalent to the lien which the law creates upon the property of other owners in like cases. In the Pub. Sts. c. 16, § 64, the words are: "When public buildings or other public works upon which liens might attach for labor or materials, if they belonged to private persons, are about to be constructed or repaired for the Commonwealth by contract, the officers or agents," etc. R. L. c. 6, § 77. The object of the contract is to relieve such contractors from the effect of their inability to maintain an action against the Commonwealth for the enforcement of a lien.

The parties must be presumed to have known of this statute when they made the contract before us. They inserted in the contract this provision, which plainly refers to the general subject of securing contractors for debts due for labor or materials. Presumably they had a purpose in it, and it must be given meaning if possible. If it is construed strictly and narrowly, in accordance with the plaintiff's contention, it has no possible application to the subject of the contract. Against the Commonwealth as an owner there can be no lien or claim for labor or materials for which the Commonwealth might be liable, and which is chargeable to the contractor, because there is no statute giving a lien against the property of the Commonwealth. The distinction arises because the Commonwealth is not an ordinary party, is not suable in the ordinary way, and does not acquire property for ordinary uses. To give this clause any effect the word "owner" must be held to have been used in the sense of an ordinary owner, or an owner apart from peculiar qualities as a sovereign State, affecting the liability to suits and the creation of liens. If the clause were read, "a lien or claim for which, if established, an ordinary owner of said premises might become liable," etc., it would be free from ambiguity. If we read it in this way, we give effect both to the statute and the provision of the contract. If we give it the other meaning, the statute is set at defiance, and the provision is inapplicable to the subject with which the parties were dealing. We think it should be so construed as to give it effect.

In *Nash* v. *Commonwealth*, 174 Mass. 335, and *Kennedy* v. *Commonwealth*, 182 Mass. 480, this statute was considered, and

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it was held that a contract under it gives the contractors an equitable interest in the property held by the agent of the Commonwealth as security. We are of opinion that a decree should be entered sustaining the equitable defence set up in the answer, and directing payment to be made to the claimants of the fund.

So ordered.

C. B. Gleason, (*L. K. Storrs* with him,) for the claimants John Farquhar's Sons and another.

H. C. Joyner, for the claimants James A. McIntosh and others.

J. Cavanagh, for the claimants Berry and Ferguson and others.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, for the Massachusetts School for the Feeble-Minded, were given leave to file a brief.

A. E. Burr, trustee, *pro se*.

JOHN M. KENNEDY & another *vs.* E. GERTRUDE HOYT & another.

Suffolk. January 8, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Election between counts. *Trespass. Mortgage*, Of personal property.

In an action of tort by a purchaser of personal property from a trustee in bankruptcy against one who held a chattel mortgage on the property, which he had attempted to foreclose after the adjudication in bankruptcy, there were two counts, the first in the nature of trover and the second in the nature of trespass *quare clausum fregit*. There was evidence that the plaintiff was in possession of the property, and had forbidden the defendant to enter his premises to take the property covered by the mortgage until he came with a writ of replevin, that the defendant came without such a writ, and, in removing a partition which he claimed under the mortgage, injured certain goods, and also took and carried away certain property which was not covered by the mortgage. The defendant excepted to a refusal of the judge to require the plaintiff to elect upon which count he would proceed. *Held*, that, assuming for the purpose of decision that the matter of election was one of right and not within the discretion of the presiding judge, as it probably was, the ruling of the judge was correct, because,

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if the jury should find that the entry was lawful but that some of the goods taken belonged to the plaintiff, the count in the nature of trover would be necessary, although, if the jury should find that the entry was unlawful, the plaintiff might recover additional damages for the conversion of these goods under the count in the nature of trespass *quare clausum*, under proper instructions not to duplicate damages.

A mortgagee of personal property, who has the right to the possession of the property on account of a breach of condition, has no right to enter the close of another person for the purpose of taking the property.

TORT against E. Gertrude Hoyt and Everett B. Henderson, the first count being in the nature of trover and the second count in the nature of trespass for a forcible entry. Writ in the Municipal Court of the City of Boston dated April 24, 1906.

On appeal to the Superior Court the case was tried before *Bell*, J. It appeared in evidence that the defendants were joint mortgagees in a mortgage given by one Torpey of personal property at 94 Blackstone Street in Boston, dated September 14, 1904, for $600, recorded in the city clerk's office in Boston and at the mortgagor's place of residence in Everett, and that Torpey, being unable to pay the mortgage note, delivered the keys of the store at No. 94 Blackstone Street to the defendant Henderson, who entered and took possession thereof.

On January 4, 1906, Torpey was adjudicated a bankrupt, the mortgage being then about three months overdue, and one Clark, who was appointed trustee of the estate of the bankrupt, executed a bill of sale of the personal property in the store to the plaintiffs. Before that time, however, the defendants had foreclosed the mortgage and purchased the property at the foreclosure sale, but this was after the petition in bankruptcy had been filed by Torpey. The plaintiffs denied the validity of the foreclosure proceedings. After the plaintiffs assumed possession, the defendant Henderson entered and removed the property from the premises. There was no question as to the validity of the mortgage.

The character of the evidence is indicated sufficiently in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant Hoyt. The defendant Henderson asked the judge to order the plaintiffs to elect upon which count they would go to the jury. This the judge refused to do. The de-

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fendant Henderson asked the judge to order a verdict for him, and also requested the following rulings which are referred to in the opinion as properly refused by the judge:

3. The defendants, having a right to enter and repossess themselves under their mortgage, may use such force as is necessary to recover possession, though in so doing they commit a breach of the peace.

4. The defendants, having obtained possession peaceably, are not trespassers, though opposed by the plaintiffs after such entry.

8. The defendants are liable only for nominal damages as to injury to the plaintiffs' business.

The judge ruled that there was evidence against the defendant Henderson on both of the counts. He ruled that there was no evidence which would justify him in finding that there was any valid sale of the property. The jury returned a verdict for the defendant Hoyt as ordered by the judge. Against the defendant Henderson they returned a verdict for the plaintiffs in the sum of $75 on the first count and in the sum of $35 on the second count. The defendant Henderson alleged exceptions.

E. B. Callender & E. M. Shanley, for the defendant Henderson, submitted a brief.

H. W. Beal, for the plaintiffs.

LORING, J. The jury were warranted in finding the following to be the facts in the matters on which there was a dispute in the case at bar.

The plaintiffs had forbidden the defendant Henderson to enter on the premises to take the property covered by the mortgage until he came with a writ of replevin. The defendant Henderson in removing the partition (assuming it to have been covered by the mortgage) negligently if not intentionally threw tea and coffee on the floor and trampled on them, thereby rendering them of no value. Some of the property taken by the defendant was not covered by the mortgage.

1. The request that the plaintiffs be required to elect would seem to be an appeal to the discretion of the presiding judge and not the subject of an exception. See *Carlton* v. *Pierce*, 1 Allen, 26; *Crafts* v. *Belden*, 99 Mass. 535. But passing that by, the ruling of the judge was right. If the plaintiffs proved

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that some of the goods taken away were theirs, and failed to prove that the entry was unlawful, the count in trover was necessary, *Ropps* v. *Barker*, 4 Pick. 239, *Eames* v. *Prentice*, 8 Cush. 337, *Merriam* v. *Willis*, 10 Allen, 118, *Beers* v. *McGinnis*, 191 Mass. 279, although they could recover for the conversion of those goods under the second count if they proved that the entry was unlawful. Full and careful instructions were given not to duplicate the damages.

2. The difficulty with the defendant's third and fourth requests is that they assume that the defendant had a right to enter on the plaintiff's premises and take the goods covered by the mortgage. The right to possession under the mortgage did not give the defendant a right to enter the close of the plaintiffs who were not the mortgagors. *McLeod* v. *Jones*, 105 Mass. 403. *Bacon* v. *Hooker*, 177 Mass. 335. The evidence was conflicting as to there having been a license in fact, express or implied.

The fourth request was given except so far as it assumed that the defendant had a right to enter.

3. The only other ruling refused was the eighth, and that has not been argued.

There is no merit in any of the exceptions, and the entry must be

Exceptions overruled, with double costs and twelve per cent interest.

ARTHUR JAEHNIG *vs.* J. G. & B. S. FERGUSON COMPANY.

Suffolk. January 8, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., LORING, SHELDON, & RUGG, JJ.

Negligence.

If a boy ten years of age has been playing ball in a street in violation of a city ordinance, and before he has left the street is run over by a delivery wagon negligently driven and is injured, his violation of the ordinance does not prevent him from recovering in an action against the owner of the wagon, unless such violation was a direct and proximate cause contributing to the accident, and if he was injured after he had abandoned the game and had started to travel home, the fact that his previous unlawful play was the reason for his being in the street does not make it a direct and proximate cause of the accident.

In an action by a boy ten years of age, when injured, against the owner of a

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delivery wagon, which ran over the plaintiff when being driven rapidly and negligently by a servant of the defendant around the corner of a cross street into a street where the plaintiff had been playing ball contrary to a city ordinance, there was evidence that the game consisted in bowling the ball and trying to catch it when it was returned, that the shop of the plaintiff's father was near by on the street, that the father had called twice to the plaintiff, and that, after the second call, the ball was bowled toward the plaintiff and went by him in the street, that he started walking in the direction of his father's shop which was also in the direction of the ball, a few feet away from him, and that, before he had gone as far as the place where the ball was, he was struck by the wagon and was injured. In one part of his testimony the plaintiff said that he gave up the game and started for the place where his father was standing and where his father's shop was. It did not appear that there was much travel on the street. *Held*, that it was a question of fact for the jury whether the plaintiff had given up the game before he started to take the three or four steps which brought him in collision with the defendant's wagon, and that, if the jury found for the plaintiff on that point, it also was a question for them whether the plaintiff's general conduct in reference to danger from teams on the street was that of ordinarily careful boys of his age.

TORT, by a boy about ten years of age when injured, for personal injuries incurred in the afternoon of July 31, 1906, on Ashley Street in Boston, under the circumstances described in the opinion, through the alleged negligence of a servant of the defendant. Writ in the Municipal Court of the City of Boston dated August 18, 1906.

On appeal to the Superior Court the case was tried before *White*, J., who instructed the jury that upon all the evidence the plaintiff was not entitled to recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions, it being agreed that, if the ruling of the judge was right, judgment should be entered on the verdict for the defendant; and that, if the ruling was wrong, there should be no new trial but that judgment should be entered for the plaintiff in the sum of $200.

F. M. Carroll, (*L. E. Flye* & *J. W. Milne* with him,) for the plaintiff.

C. S. Knowles, for the defendant.

KNOWLTON, C. J. The plaintiff, a boy about ten years of age, was run over and injured on one of the public streets of Boston, by a delivery wagon in charge of one of the defendant's servants.

There was evidence on which the jury might have found that the defendant's servant was driving rapidly and negligently, and that this negligence caused the accident.

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The plaintiff had been playing ball on the street, in violation of an ordinance of the city of Boston, and there was evidence tending to show that one of his movements in the game brought him in collision with the team, and was a contributing cause of the accident. On the other hand, he testified that he had been called by his father, and at the time of the accident had given up the game, and was on his way to his father's shop near by.

If his violation of a city ordinance was a direct and proximate cause contributing to the accident, as distinguished from a mere condition accompanying it, he cannot recover. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. But if he was injured after he had abandoned the game and had started to travel home, the mere fact that he had been playing previously in violation of the ordinance, and might not have been there at that time except for his previous game, does not make his unlawful play a direct and proximate cause of the accident.

In the game he was bowling the ball and trying to catch it when it was returned. According to the testimony his father had called him twice, and soon after the second call the ball was bowled towards him, and went by him in the street. He started, walking in the direction of his father's shop, which was also in the direction of the ball a few feet away, and was struck by the wagon before he had gone so far as the place where the ball was. The defendant argues that he was going to get the ball as a part of the game, and that the jury should not have been permitted to find to the contrary. But in one part of his testimony he said that he gave up the game, and started toward the corner of Ashley Street where his father was standing and where his father's shop was. We are of opinion that it was a question of fact for the jury whether he had given up the game before he started to take the three or four steps which brought him in collision with the defendant's wagon.

If the jury found for the plaintiff on that point, we are of opinion that it was also a question for them whether his general conduct, in reference to danger from teams in the street, was that of ordinarily careful boys of his age. The evidence falls short of showing a high degree of care, but it does not appear that there was much travel on the street, or that very great vigilance in reference to the possibility of being struck by a team

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being driven rapidly around the corner from a cross street would be expected from ordinary boys. While the testimony tends to show that he was not in the exercise of due care, we cannot say that there was not sufficient evidence for the plaintiff to present a question of fact for the jury.

Judgment for the plaintiff according to the agreement of the parties.

CATHERINE MINIHAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 14, 1908. — February 26, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Interrogatories. Practice, Civil, Exceptions. *Negligence. Street Railway. Res ipsa Loquitur. Evidence,* Presumptions and burden of proof.

In an action of tort against a corporation, if the president of the defendant has refused to answer certain interrogatories filed by the plaintiff, on the ground that the questions contained in them are not material to the issues in the case, the refusal of the defendant's president to answer the interrogatories, whether justified as matter of law or not, is not for the consideration of the jury, and a ruling allowing the plaintiff to read the questions and the refusals to the jury is erroneous.

In an action of tort against a corporation, where the presiding judge, against the defendant's exception, erroneously has allowed the plaintiff to read to the jury refusals of the defendant's president to answer certain interrogatories on the ground that they are immaterial, and the plaintiff in his argument to the jury comments on these refusals as indicating a desire on the part of the defendant not to disclose material evidence which it could disclose, if the defendant in its argument to the jury attempts to justify the refusals, this does not waive its exception to their admission as evidence, it being obliged to argue the case on the evidence which has been admitted.

In an action against a corporation operating a street railway for personal injuries, if it appears that the plaintiff's injuries were caused by a car of the defendant in which the plaintiff was a passenger leaving the rails near the edge of an embankment seven feet high, going off the bank and turning over on its side in a street below, and this accident is unexplained, the doctrine of *res ipsa loquitur* applies, an inference being justified that the defendant was at fault, and this inference being the same if the car was in good condition at the time of the accident.

In an action against a corporation operating a street railway for personal injuries caused by a car of the defendant in which the plaintiff was a passenger leaving the rails near the edge of an embankment seven feet high, going off the bank and turning over on its side on a street below, where the accident was unexplained, the plaintiff put in evidence the answers of the defendant's president to

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interrogatories filed by the plaintiff containing testimony that the car had been inspected shortly before the accident and was in good condition. There was no evidence in the case in addition to the answers to the interrogatories except the fact of the accident. The defendant asked the judge to instruct the jury that there was no evidence of negligence on the part of the defendant or of its servants or agents in regard to the inspection of the car, and that there was no evidence from which the jury would be warranted in finding the existence of any defect in the car or its apparatus at the time of the accident. *Held*, that these instructions should have been given, not because the plaintiff was estopped to contradict the answers of the defendant's president in regard to the inspection and good condition of the car, but because no such evidence in contradiction was introduced, and the happening of the accident, although evidence of negligence of some kind on the part of the defendant, was not evidence of negligence in failing to keep the car in good condition.

TORT for personal injuries incurred on the evening of August 31, 1904, when the plaintiff was a passenger on a short four wheeled box car of the defendant on Dorchester Street in that part of Boston called South Boston. Writ dated October 20, 1904.

In the Superior Court the case was tried before *Holmes*, J. It appeared that the car in which the plaintiff was a passenger contained about twenty-five passengers and was not crowded. The accident occurred at or near a certain disused railroad bridge of the New York, New Haven, and Hartford Railroad Company, near the corner of Newman Street and Dorchester Street. For some months before and after this accident, the street department of the city of Boston had been cutting down the grade of Dorchester Street at this point, and for a considerable distance on either side of this point. The steam railroad formerly went under Dorchester Street, and the flooring of the steam railroad bridge represented the former level of Dorchester Street at its highest point, from which it sloped off in either direction; but at the time of the accident all but a small portion of Dorchester Street had been cut down to the level on which the steam railroad formerly ran, leaving a strip of Dorchester Street on its original level, consisting of a sidewalk and a roadway on which remained one of the defendant's tracks; the roadway and tracks passing over one end of the old steam railroad bridge, the level of the bridge being about eight or nine feet above the new level of Dorchester Street. This strip of Dorchester Street gradually rose from a point a considerable distance back of the bridge to the bridge and then sloped away

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again on the other side of the bridge, and terminated on its outer edge throughout its entire course in a fairly steep bank, which represented the limit of the advancing excavation. During the course of the work, the defendant had run its cars over the track on the strip of roadway and was running them there on the evening of the accident; and the rail of the track nearer the edge of the bank was about a foot from that edge. The portion of the street occupied by the track was paved and the paving extended out to the edge of the bank.

The car in which the plaintiff was being transported left the rails and went over the bank at a point some feet beyond the bridge, and at a place where the bank was about seven feet high; the car turned over on its side in the street below; and the plaintiff, who was in the exercise of due care throughout, was injured.

Before the trial, namely on August 22, 1906, the plaintiff under the statute had filed sixteen written interrogatories to William A. Bancroft, the president of the defendant. The questions, refusals to answer and answers, which are referred to in the opinion, were as follows:

"Int. 4. For how long a time prior to August 31, 1904, had the motorman in charge of said car at the time of the accident been in the service or employ of the defendant company in the capacity of motorman?

"Ans. 4. I am advised by counsel that there is nothing in the plaintiff's claim as set out in her declaration rendering such a question as this relevant or in any way material, and that for that reason I am not obliged to answer it. I must, therefore, decline to answer this interrogatory unless ordered by the court so to do.

"Int. 5. For how long a time prior to August 31, 1904, had the conductor of said car been in the service or employ of the defendant company in the capacity of conductor?

"Ans. 5. I must decline to answer this interrogatory for the reasons stated in my answer to Interrogatory 4.

"Int. 6. On August 31, 1904, was not said motorman employed merely as a 'spare' motorman, or as an 'extra' motorman?

"Ans. 6. I must decline to answer this interrogatory for the reasons stated in my answer to Interrogatory 4.

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"Int. 7. On August 31, 1904, was said conductor employed merely as a 'spare' conductor, or as an 'extra' conductor?

"Ans. 7. I must decline to answer this interrogatory for the reasons stated in my answer to Interrogatory 4."

"Int. 10. Was any examination made of said car by the defendant corporation on said August 31, 1904, or shortly before, or shortly afterwards?

"Ans. 10. Yes, the car was, of course, inspected from time to time before the accident, and it was carefully examined by employees of this company for the purpose of reporting upon its condition after the accident.

"Int. 11. If so, state fully what examination was made of same, where and by whom, and what was the condition of the car and its appliances at the time of said examination or examinations?

"Ans. 11. See answer to Interrogatory 10. I am advised by counsel that the statute expressly exempts me from the obligation of giving the names of the witnesses who made this examination, and for that reason I must decline to give their names before the trial. The condition of the car after the accident was as stated in Interrogatory 8. The wheels, axles, truck, frame, springs, journal boxes, and brake mechanism were found to be in perfect condition after the accident."

The interrogatories numbered 4, 5, 6 and 7 and the refusals of the defendant's president to answer them were read to the jury against the objection and exception of the defendant.

In arguing to the jury, the counsel for the defendant attempted to defend the witness's refusals to answer these interrogatories and the counsel for the plaintiff commented in his argument upon the refusals to answer which he had been permitted to read as indicating a desire on the part of the defendant not to disclose material evidence which it could disclose.

At the close of the evidence the defendant asked the judge to order a verdict for the defendant, which the judge refused to do. The defendant then asked for certain rulings, among which were the following:

"9. The court instructs the jury that they cannot find a verdict against the defendant unless they are satisfied that the accident was due to some negligence on the part of the defendant, or of its servants or agents, and that they are not entitled to

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guess or speculate as to the nature of such negligence, but that they must be able to determine in their own minds on the evidence and with reasonable certainty what the negligence was that caused the accident, if it was caused by negligence.

"10. The court instructs the jury that they cannot find a verdict against the defendant unless they are satisfied by a fair preponderance of the evidence that the derailment of the car was due to some negligence on the part of the defendant, or of some of its servants or agents; and the jury in that case is not entitled to find such negligence from the mere happening of the accident without more; but they must be able to reach some conclusion as to what the negligence was.

"11. The court instructs the jury that unless the plaintiff has proved by a fair preponderance of the evidence that the derailment and overturning of the car were due to some negligence on the part of the defendant, or of its servants or agents, as alleged in the declaration, the plaintiff is not entitled to recover; and in determining this question the jury is not entitled to guess or speculate as to the existence of such negligence; but the jury must be satisfied by a fair preponderance of the evidence as to the existence and nature of some particular negligence before they can find a verdict for the plaintiff."

"17. The court instructs the jury that there is no evidence from which they would be warranted in finding any negligence on the part of the defendant, or of its servants or agents, in the inspection of the car prior to the accident."

"20. The court instructs the jury that there is no evidence from which they would be warranted in finding the existence of any defect in the car or its apparatus at the time of the accident."

The judge refused to make any of these rulings. The jury returned a verdict for the plaintiff in the sum of $7,112; and the defendant alleged exceptions, which after the death of *Holmes*, J., were allowed by *Brown*, J., under R. L. c. 173, § 108, the truth of the exceptions having been agreed to by the counsel for the parties.

W. G. Thompson, (*S. H. E. Freund* with him,) for the defendant.

J. E. Cotter, for the plaintiff.

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LORING, J. 1. The refusal of the president of the defendant railway company to answer interrogatories 4, 5, 6 and 7 was the assertion of a right based on a question of law.

It happened that he was right in his refusal to answer these interrogatories, that is to say, he was right on the question of law raised by him. The plaintiff did not declare on negligence in employing an incompetent conductor or motorman, and for that reason these interrogatories were not material.

But the fact that the president of the defendant company was right is of no consequence in this connection. Right or wrong, his refusal to answer an interrogatory based on a question of law was a matter for the court and for the court alone; it was not a matter for the consideration of the jury, much less was it a matter from which the jury ought to have been allowed to draw an inference of fact. It is the right of either party to an action in court to raise any question of law he may deem wise. In case he does so, the sole question is whether the point of law is well taken. That (as we have said) is a question for the court and for the court alone. It is for this reason that the practice has obtained of arguing questions of law in the absence of the jury when the discussion in their presence would be apt to mislead them in determining the issues of fact to be decided by them.

The exceptions taken to the ruling allowing the plaintiff's counsel to read to the jury the refusal by the defendant's president to answer interrogatories 4, 5, 6 and 7 were not waived by the argument to the jury made by counsel for the defendant. After the refusal of the defendant's president to answer these interrogatories had been read to the jury as evidence for their consideration there was nothing left for counsel to do but to argue the case on the evidence which had been admitted.

These exceptions must be sustained.

2. The exceptions taken to the refusal to give the ninth, tenth and eleventh rulings asked for must be overruled.

The defendant's contention here is that by putting in evidence the answers of the defendant's president to interrogatories 10 and 11 the plaintiff's case must be taken to admit that the car was in good condition; and if the car was in good condition there is a partial explanation, and for that reason the rule of *res ipsa loquitur* does not apply. If there had been a binding

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admission by the plaintiff that the car was in good condition the effect of the rule of *res ipsa loquitur* would not have been lessened.

What is meant by the statement that *res ipsa loquitur* applies where there is no explanation by the defendant (*Feital* v. *Middlesex Railroad*, 109 Mass. 398, *Savage* v. *Marlborough Street Railway*, 186 Mass. 203, *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295) is that this rule applies where the defendant does not show what caused the accident. Had the evidence that the car had been inspected and found to be in good order been coupled with evidence that the same was true of the track and that the conductor and motorman had exercised due care, there would have been no explanation of how this accident occurred.

Again, the rule of *res ipsa loquitur* means that in the ordinary experience of mankind the accident would not have happened without fault on the part of the defendant. Holmes, J., in *Pinney* v. *Hall*, 156 Mass. 225, at pp. 225, 226. See also Braley, J., in *Hofnauer* v. *R. H. White Co.* 186 Mass. 47, 49. A car ordinarily does not leave its track and roll down an embankment unless something is wrong, and that is as true when the car is in good condition as when it is not.

3. We are of opinion that the exception to the refusal to give rulings 17 and 20 must be sustained. Not however on the ground that the fact that the car was in good condition became a fact in the case as if it had been admitted in the pleadings. Where a plaintiff puts in the defendant's answer to interrogatories he does not thereby bind himself to the truth of the facts therein stated. He could contradict the facts there stated by evidence. But until contradicted by evidence, the truth of the facts stated stands as against the plaintiff who puts in the defendant's answers. In the case at bar there was no evidence in addition to the answers to interrogatories, but the fact of the accident; and in our opinion the fact of the accident is not evidence which warrants a finding that the car was not in good condition, and the plaintiff's evidence that it was in good condition is not overcome.

Exceptions sustained.

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DANIEL SHEA *vs.* INHABITANTS OF WHITMAN.

Plymouth. November 14, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pleading, Civil, Declaration. *Way,* Defect in highway.

Under a declaration in an action of tort against a town which alleges that a public highway which the defendant was bound to keep in repair so that it would be safe and convenient for travel "was negligently suffered by the defendant to be out of repair, unsafe and inconvenient, whereby the plaintiff, travelling thereon and using due care, was hurt," the plaintiff can recover for an injury received by him by reason of the lack of a barrier to protect travellers on the highway from a condition near it which is such as to expose them to unusual hazard.

At the trial of an action of tort against a town to recover for injury alleged to have been received by the plaintiff because of an unsafe condition of a highway which the defendant was bound to keep safe for travel, it appeared that the plaintiff tripped over a stone which, though not in the highway, was in a beaten walk at one side which had the appearance of a part of the highway, and the plaintiff contended that the defendant should have erected a barrier to protect the travelling public from injury because of the stone. There was no evidence as to the size or shape of the stone. The judge presiding at the trial directed a verdict for the defendant. *Held,* that the verdict was directed rightly, since it did not appear that there was a condition beside the way such as to expose travellers to unusual hazard and from which they should be protected by a barrier erected by the defendant.

TORT. Writ in the Superior Court for the county of Plymouth dated April 6, 1903.

The declaration was as follows: "And the plaintiff says that there is in the town of Whitman a public highway known as Temple street and leading from Dover street to South avenue, which said defendant is bound to keep in repair so that it would be safe and convenient for travel, but the same was negligently suffered by the defendant to be out of repair, unsafe, and inconvenient, whereby the plaintiff, travelling thereon and using due care, was hurt, and due notice of the time, place, and cause was given to the defendant."

At the trial, which was before *Holmes,* J., there was evidence tending to show that the plaintiff was injured by tripping over a stone, which was in a path or earth walk at the side of a street that, through use, had come to have the appearance of a

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travelled part of the sidewalk, but he admitted that he was unable to show that the stone was within the limits of the highway. The presiding judge suggested that the plaintiff should amend his declaration so as to allege a failure of the town to erect suitable barriers to guard against the stone, and to proceed against the town for that omission, but the plaintiff declined to do so, contending that, although he could not show that the stone was within the limits of the way, he still could recover for injury occasioned by it as a defect in the way if it was so near outside of the line of the way as to be dangerous, and if the actual uses of the space around and adjoining it were as the evidence showed.

At the close of the evidence, the presiding judge directed a verdict for the defendant and the plaintiff excepted. Other facts are stated in the opinion.

C. B. Snow, for the plaintiff.

E. O. Achorn, for the defendant.

HAMMOND, J. The plaintiff was right in his contention that the declaration was broad enough to cover the case of a defect in a highway consisting of a want of a suitable rail or barrier. Pub. Sts. c. 167, § 94, form, "Negligence of Town." R. L. c. 173, § 130. *Alger* v. *Lowell*, 3 Allen, 402. It was therefore unnecessary for him to amend.

The order directing a verdict for the defendant, however, was general and must stand, unless the plaintiff shows that the case should have been submitted to a jury. The plaintiff was injured by tripping over a stone. It was admitted that the stone was not within the limits of the highway. It is stated that the evidence tended to show that "it would have constituted a defect if within the limits of the way," but there is no evidence as to its size or shape. The plaintiff evidently proceeds upon the theory that where a stone which, if in the way, would constitute a defect, is so near the highway that travellers by tripping over it may get hurt, a barrier or railing should as matter of course be erected to protect travellers. But that is not the law. It cannot be said as matter of law that in every such case a barrier should be erected. As stated by Allen, J., in *Damon* v. *Boston*, 149 Mass. 147, 151: "The danger which requires a railing must be of an unusual character, such as bridges, declivi-

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ties, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them unless their condition is such as to expose travellers to unusual hazard." See also *Hayden* v. *Attleborough*, 7 Gray, 338; *Scannal* v. *Cambridge*, 163 Mass. 91, and cases there cited; *Logan* v. *New Bedford*, 157 Mass. 535; *Richardson* v. *Boston*, 156 Mass. 145, and cases cited. The fact that there was nothing to mark the line of the highway is immaterial. *Damon* v. *Boston*, *ubi supra*.

Under the doctrine thus laid down, the plaintiff failed to show a case for the jury.

Exceptions overruled.

HARRIET E. BROOKS *vs.* EDWARD P. SHAW & others.

Suffolk. November 18, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Exceptions, Interrogatories. *Agency*, Undisclosed, Scope of Authority.

After a hearing before a judge of the Superior Court on a motion of a plaintiff in an action of contract to compel the defendant to answer more fully interrogatories propounded to him by the plaintiff, the judge granted the motion and the defendant excepted, but filed no bill setting forth his exception. Like exceptions were taken to subsequent rulings by different judges on similar motions of the plaintiff with regard to further answers which the defendant had filed to the interrogatories, but no bills were filed setting them forth. Subsequently there was a trial of the case before the judge who made the first ruling with regard to the answers to the interrogatories, exceptions were taken by the defendant to rulings in favor of the plaintiff made at the trial, and a bill setting forth such exceptions was filed more than twenty days after the last ruling as to answers to the interrogatories, and was allowed. This bill of exceptions also contained a full statement of all the rulings by the various judges as to the answers to interrogatories. *Held*, that upon the record no exception with regard to the interrogatories was before this court.

A firm who were engaged in the express business in Cambridge and Boston received, on a contract limiting liability to $50, goods worth $200 consigned to a person in Cambridge, and lost them in transportation. The consignee had a conversation with one who was an agent in charge of the express firm's business in Cambridge, who told him, in substance, to replace the goods and "he would settle for it." The consignee replaced the goods, but the express firm refused

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to reimburse him, and he brought an action of contract against the members of the firm to enforce the agreement, at the trial of which before a judge without a jury, the judge found the following facts: The defendants had purchased the business from the father of the agent who made the promise to the plaintiff, who, before the purchase, had managed the business for his father, and whom the defendants had kept in their employment as agent in charge of the Cambridge business. The name under which the business was done by the agent's father had remained unchanged, but his authority as agent for the defendants to settle claims was limited to claims not larger than $8. The plaintiff, however, at the time of the promise of the agent, did not know of the sale of the business by the agent's father to the defendants, nor of the limitation of the agent's authority. The judge refused to rule that, because he did not know that the agent was acting for the defendant but thought he was acting for the agent's father, the plaintiff was bound by the agent's actual authority; but he did rule that the promise of the agent was within his ostensible authority and that the plaintiff was not bound by the limitation of authority of which he did not know. *Held*, that the rulings and refusal to rule were correct, since, after the existence of an agency, whether undisclosed or disclosed, is found, the rule that, to one who has no notice of a limitation of the agent's authority, the principal is responsible for all acts of the agent within the apparent scope of his authority, applies.

CONTRACT OR TORT to recover the value of goods of the plaintiff alleged to have been lost by the defendants who, being engaged in business under the name of "Sawin's Express," accepted them for transportation to the plaintiff. Writ in the Municipal Court of the City of Boston dated April 9, 1906.

On appeal to the Superior Court, after hearings before *Schofield*, J., *Fessenden*, J., and *Fox*, J., with regard to answers to interrogatories to the defendants filed by the plaintiff, the case was tried before *Schofield*, J., without a jury, who ruled and refused to rule as stated in the opinion, and found for the plaintiff; and the defendants alleged exceptions.

As to exceptions by the defendants to rulings of the various judges with regard to the answers to interrogatories, the record did not disclose that any bill containing such exceptions was filed, but the only bill of exceptions which was in the record was allowed by *Schofield*, J., and it set forth the interrogatory in question, with all the successive answers to it and the rulings of the various judges as to such answers.

Other facts are stated in the opinion.

W. R. Buckminster, for the defendants.

A. H. Brooks, for the plaintiff.

RUGG, J. The defendants first seek to raise questions as to the competency of an interrogatory, which they were compelled

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to answer. The plaintiff objects that this is not open. The record discloses that the matter first came before a justice of the Superior Court, who ordered that the defendants be defaulted on September 27, unless the interrogatory should before that date be answered. The defendants thereupon claimed an exception to said order. Thereafter, the answer not being satisfactory, nor full, a motion was made before another justice of the Superior Court, who entered an order requiring the defendants to further answer. The defendants took a verbal exception to this order. Another incomplete answer having been filed by the defendants on November 1, 1906, a third justice of the Superior Court ordered that a further answer be filed, and to this order an exception was taken. Thereafter the cause proceeded to trial before the justice who made the first order, and the only bill of exceptions was allowed by him on the eleventh day of May, 1907. Upon this record no exception respecting the interrogatories is before us. The statute governing this question is R. L. c. 173, § 106 and Rule 44 of the Superior Court. The material part of the rule is: "Exceptions alleged in the trial of a civil case shall be reduced to writing and filed, . . . within twenty days after the verdict or finding in the case is rendered, or after the opinion, ruling, direction, or judgment excepted to in a case not on trial is given, unless for cause shown further time is allowed by the court." It does not appear that any further time was allowed for filing exceptions in this case. The orders excepted to were made by three different justices of the Superior Court. It is irregular and improper to embrace in a single bill exceptions taken at different stages of the case before different magistrates. The only provision for an allowance of exceptions by any other than the justice before whom they are taken is in the case of disability, death or resignation, as provided in R. L. c. 173, § 108. Moreover, the rule requiring the exceptions to be filed within twenty days after the ruling or direction excepted to was not complied with as to any of these orders to answer interrogatories. Where exceptions are taken to interlocutory orders, the only course open, conformable to the statute and rule, is for the aggrieved party to file his bill of exceptions and have it allowed by the justice of whose act he complains. When the case is ripe for final judgment, or is in a condition to be finally

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disposed of in the Superior Court if the exceptions are overruled, then all bills of exception allowed both as to interlocutory and final matters are to be entered in the full court. *Safford* v. *Knight*, 117 Mass. 281. *Lowd* v. *Brigham*, 154 Mass. 107. The general practice has been in conformity with this view. *Spinney* v. *Boston Elevated Railway*, 188 Mass. 30. *Toland* v. *Paine Furniture Co.* 179 Mass. 501. *Hancock* v. *Franklin Ins. Co.* 107 Mass. 113. *Robbins* v. *Brockton Street Railway*, 180 Mass. 51. *Soebel* v. *Boston Elevated Railway*, *ante*, 46.

The trial judge found that for a period of many years prior to September 1, 1904, one M. M. Sawin carried on an express business between Boston and Cambridge under the name of "Sawin's Express," and that Herbert E. Sawin was assistant manager. The defendants acquired the business in September, 1904, and continued to carry it on under the name of "Sawin's Express" in the same manner in which it had been carried on theretofore without change in the name, lettering on wagons, or bill heads, and Herbert E. Sawin was continued as the agent at Cambridge in charge of the business. In November, 1905, a dress belonging to the plaintiff was lost while being transported by Sawin's Express from Boston to Cambridge, it having been received from the consignor on a contract limiting liability in case of loss to $50. The defendants were unable to find the package, and Herbert E. Sawin in a conversation with an agent of the plaintiff said, in substance, that he preferred, rather than to pay for the one that was lost, that the plaintiff should get a new dress and that he would settle for it. At the time of this conversation neither the plaintiff nor her agent had any knowledge of the transfer of Sawin's Express to the defendants, but believed that it was being carried on by the same persons as before the sale. Herbert E. Sawin disclosed no agency, and purported to act as principal, but in fact had no authority to bind the defendants by the proposition made, his instructions being to refer all claims in excess of $3 to the Boston office. No notice of this limitation of authority was brought home to the plaintiff or her agent. The judge further found that Herbert E. Sawin in dealing with the plaintiff and her agent was in fact agent for the defendants, who were undisclosed principals, and ruled that the plaintiff had a right of action against the defend-

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ants, and that they could not set up the limitation which they had imposed upon the authority of Sawin and found for the plaintiff. The judge also refused to rule that if at the time of the promise the plaintiff and her agent supposed that M. M. Sawin was the owner of the Sawin's Express, and did not understand or know that Herbert E. Sawin was acting for the defendants, then the plaintiff was bound by the actual authority of Herbert E. Sawin. The defendants' exception to the judge's refusal to give this ruling and to the ruling actually made brings the case before us.

The defendants held out Herbert E. Sawin as their agent to transact their business in Cambridge. He had express authority to settle claims not exceeding $3. The doctrine that an undisclosed principal may be charged with responsibility for and avail himself of the benefit of the acts of his agent is well settled. *Byington* v. *Simpson*, 134 Mass. 169. It follows from this, that, when the relation of principal and agent is found to exist, the ordinary rules of responsibility of the principal to third persons for the act of his agent are established. The principal is responsible for all acts of the agent within the apparent scope of his authority, or, to use the phrase of Mr. Justice Holmes in 5 Harvard Law Review, 1, "If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. . . . An agent's ostensible powers [are] his real powers." Limitations as between the principal and agent of an apparently general authority, not brought to the knowledge of third persons, do not affect the rights of the latter. One of the usual incidents of carrying on business is to settle the losses that occur in connection with that business. By an arrangement between the defendants and Herbert E. Sawin, the agent's authority as to losses was limited to $3, but his ostensible powers gave no notice of any limitation upon the extent of his authority in this respect. Therefore the plaintiff was not bound by it. *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346. *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97. *Spurr* v. *Cass*, L. R. 5 Q. B. 656. *Irvine* v. *Watson*, 5 Q. B. D. 414.

Exceptions overruled.

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ELLEN R. STIMPSON *vs.* MARY F. MURCH & another.

Middlesex. November 19, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Devise and Legacy, What estate. *Practice, Civil*, Exceptions.

At the hearing on a petition for registration of the title to land, it appeared that the real estate in question formerly had belonged to a testator, a clause in whose will read as follows: "I give and devise also to said S. my homestead estate . . . To have and to hold the same to him during his life or until he shall have married, and whenever he shall marry, and likewise in case he shall either be married or have issue at my decease, said estate shall vest in him in fee simple, and as his absolute property"; that the petitioner was married to S. after the death of the testator, that there were no children of the marriage, that S. had died, and that by his will the land was devised to the petitioner. The respondents were heirs at law of the testator and contended that the will gave to S. a life estate only. *Held*, that the language employed by the testator admitted of but one reasonable construction, namely, that S. should have the land in fee upon his marriage.

PETITION, filed in the Land Court July 20, 1906, for registration of the title of real estate on Massachusetts Avenue in Cambridge. The petitioner alleged that she was the widow of one Walter Stimpson by whose will she obtained her title.

At the trial in the Land Court, which was before *Davis*, J., it appeared that the property formerly had belonged to one Mary Ann Davenport, a widow, and the petitioner contended that her husband, Walter Stimpson, received a fee in the land under the will of Mrs. Davenport, which was made in 1888 and duly probated, and that he devised it to the petitioner. The respondents, heirs at law of Mrs. Davenport, contended that Walter Stimpson received but a life estate in the property by the will of Mrs. Davenport, that therefore there was an intestacy as to the remainder after the life estate, and that they were entitled to the property on the death of the petitioner's husband.

The judge ruled that, under the will of Mrs. Davenport, title to the property passed to Walter Stimpson in fee, and made a decree for the petitioner. The respondents excepted.

F. Burke, for the respondents.

H. I. Cummings, for the petitioner, was not called upon.

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RUGG, J. The testatrix died a childless widow in 1888, leaving as her heirs at law a brother, two sisters and a nephew, Walter Stimpson. Her will, dated in 1886, provided, so far as material, that "I give and devise also to said Walter Stimpson my homestead estate, . . . To have and to hold the same to him during his life or until he shall have married, and whenever he shall marry, and likewise in case he shall either be married or have issue at my decease, said estate shall vest in him in fee simple, and as his absolute property." Walter, the nephew, mentioned in the will, in 1873, at the age of eighteen, went to live with the testatrix, and remained a member of her family until her death. She was very fond of him. He was married for the first time in 1890, and died in 1905, never having had issue. By his will his entire estate was given to the petitioner.

The question is as to the estate acquired by Walter under the will of his aunt. The cardinal rule to be followed in the interpretation of wills is to ascertain the intent of the testator, and then give it effect, unless prevented by some inexorable rule of law. The language employed by the testatrix Davenport admits of but one reasonable interpretation. It contemplates three different contingencies, which together cover the whole range of possibility as to the marriage of the beloved nephew. He was unmarried at the time the will was executed. She deals first with that situation, and says that he shall have during his celibacy a life estate which shall ripen into an estate in fee whenever he shall marry. *Weston* v. *Foster*, 7 Met. 297. The second condition for which she made provision was that of his being married at the time of her death, and she gives to him a fee in that event. The third aspect of his life, which she considered, was that of his having married and become a widower before her death, but having issue at that time, and he is given an estate in fee if these are the circumstances. The use of the words "and likewise" are criticised by the respondents as tending to create an ambiguity. But they are not susceptible of such construction. The sentence perhaps might have been slightly more grammatical, if the modifying clause creating the estate in fee simple had preceded these words, but even as to this there would probably be differences of literary taste. There is nothing unreasonable in the will as thus interpreted. It was only in the event

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that Walter should decease without having either wife or child after her death that the testatrix left her estate to be distributed as intestate among her brother and sisters. Contrary to the ineffectual attempts sometimes made by those executing wills to cut down or take away an estate on marriage, the present testatrix, in pursuance of sound public policy and the dictates of affectionate regard for the happiness of her dearest relative, gave as an added inducement to marriage a larger estate in that event.

Exceptions overruled.

MARY McNAMARA *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Release. Fraud.

A release in writing of a cause of action is not invalidated, in the absence of fraud on the part of the person procuring it, merely by the facts that the party signing it did not read it and did not understand its contents.

A mere concealment of the contents of a release of a cause of action on the part of the person benefiting by the terms of the release, even if there be an attempt to defraud, is not in itself enough to avoid the release. The true rule is that, where the person to whom the release is given undertakes to state its contents and conceals a material part of them, a fraudulent misrepresentation which invalidates the release is made out.

At the trial of an action of tort against a street railway company to recover for personal injuries alleged to have been received by the plaintiff, a woman, while a passenger upon a car of the defendant, the defendant relied in defence upon a release under seal. The plaintiff admitted that she signed the release but contended that when she did so she did not have legal competency to act, and that she was induced to sign by fraud on the part of the defendant's agent. There was evidence tending to show that, after the accident, the plaintiff was "in a very weak, hurt condition," that she travelled to within a short distance of her home by other street cars, making two transfers on the journey, and walked the remainder of the distance unattended, that then she went upstairs and lay down for a time when, in answer to a summons by the door bell, she came down stairs, "almost collapsed because of the effort," rested a moment and then opened the door, and admitted the agent of the defendant. Her account of her interview with the agent was intelligent and, among other things, it appeared that the interview lasted from four o'clock to fifteen minutes after four, that the agent either told her that he had been to the houses of other passengers and "all the ladies had signed," or that he had been to all the houses "and they

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signed," that the agent urged her to sign and that she, at first saying that she could not tell whether she was going to "sue the road" or not until she had seen her doctor, and protesting that she physically was unable to sign, finally did sign the release, and that, thereafter, in response to a question by him, she told the agent that the physician whom she was going to see was her family physician, that the agent thereupon handed her $5 and, she asking "What is this for?", he stated "That will pay the doctor." There was further testimony that, after the agent left, the plaintiff was "in a very weak condition," and, within an hour "was hysterical" in conversation with her husband and "unable to give a clear story of the accident," but that, within another hour she told the story of the accident to her physician. The plaintiff testified that she could not remember whether the agent read the release over to her or explained it to her. There was no evidence that the agent's statement as to the other passengers having "signed the paper" was false. *Held*, that there was no evidence from which a jury would be warranted in finding either that the signature of the plaintiff to the release was procured by fraud or that, when she signed, she did not have legal competency to act; and that therefore the release was a bar to the action.

TORT for personal injuries alleged to have been received by the plaintiff while a passenger on an electric street car of the defendant. Writ in the Superior Court for the county of Suffolk dated August 17, 1905.

The answer of the defendant alleged that the plaintiff's cause of action had been released by her "by an instrument in writing over her hand and seal."

At the trial, which was before *Dana*, J., the plaintiff's evidence tended to show that a fuse burned out upon the car upon which she was near the corner of Washington and Cobden Streets in the Roxbury district of Boston and that, in the rush of the passengers to get out of the car, she was injured; that she left the car and reached the sidewalk "in a very weak, hurt condition" and walked to a nearby post, by which she was supported until she took another car to the Dudley Street transfer station, transferred there to the elevated train to Dover Street, again transferred there to a South Boston car, that her friends accompanied her to C Street, South Boston, but that she went the rest of the way to her home at 702 East Fifth Street alone. Her testimony as to what occurred after she arrived at her home and until the defendant's agent came is stated in the opinion.

As to her interview with the agent of the defendant, she testified: "Well, I opened the door and the gentleman walked in and he said to me, 'Are you Mrs. McNamara,' and I said, 'Yes,

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sir,' and he said, 'You were on the car the accident happened,' and I said, 'Yes, sir,' and I can't remember what he was saying; all I remember of his saying was, 'Have you got any bones or limbs broken,' and I said, 'No,' and he said, 'Well,' he said, 'Are you going to sue the road when you have no bones or limbs broken?' and I said, 'Well, I can't tell what I will do until I see the doctor,' I said, 'I can't explain my, — the way I feel to you.' And he said he had been to the other houses and they all signed the paper, and handed me over the paper, and he said, 'You sign your name there,' and he said, 'Let me see,' he said, 'Has that paper got Margaret Riley signed in it?' and I returned him the paper, and he handed it back again, and I said, 'Well, now, you see my condition, I can't sign my name,' and he said, taking the paper from me, and putting it on a stiff envelope, 'Let me support it for you.' 'Well,' I said, 'It is impossible,' I said, 'I feel so sick,' and I remember of writing my name the best I could. . . . He asked me what doctor I was going to have and I told him my family physician. He put his hand in his pocket and took out a $5 bill and gave it to me, and I said, 'What is this for?' he said, 'That will pay the doctor.'" The testimony then proceeded: "Q. Now, did he say anything about that paper; did he say anything about that paper being a release of all your claims against the Boston Elevated Railroad? A. I can't remember of him saying anything. — Q. Now, did you read that paper? A. No; I don't remember of reading it. — Q. Did he read it to you? A. I don't remember. — Q. Did he give you any explanation about it at all? A. I don't remember."

At the close of the evidence a verdict was directed for the defendant on the ground that the release which was in evidence barred the action; and the plaintiff excepted. Other facts are stated in the opinion.

J. A. McGeough, (*W. J. Sullivan* with him,) for the plaintiff.

R. G. Dodge, (*A. Kendall* with him,) for the defendant.

LORING, J. We are of opinion that the presiding judge was right in ruling that there was no evidence warranting a finding that the release given by the plaintiff was not binding on her.

It is settled on the one hand that it is no defence to a release that the person signing it neither read it nor understood its contents. *Leddy* v. *Barney*, 139 Mass. 394, 396. *Rosenberg* v. *Doe*,

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146 Mass. 191, 193. This is but an application of the broad principle applied in a similar connection in *Grace* v. *Adams*, 100 Mass. 505.

On the other hand it is also settled that a release can be avoided if there was a fraudulent misrepresentation as to its contents, and if the party signing it without reading it did so, relying on that misrepresentation. *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447. *Peaslee* v. *Peaslee*, 147 Mass. 171.

Further, there can be no question of his right to avoid it if he signed it when he did not have "legal competency to act," as it was put by Parker, C. J., in *Farnam* v. *Brooks*, 9 Pick. 212, 220.

The plaintiff's evidence here did not go far enough to warrant the jury in finding that the release signed by her was obtained by fraud, or that it was signed by her when she was in such a condition that she did not understand what she was doing; or, as Chief Justice Parker put it, when she did not have "legal competency to act."

A mere concealment of the contents of a release, even if there be an intent to defraud, is not *per se* enough to avoid it. The statement in *McNicholas* v. *Prudential Ins. Co.* 191 Mass. 304, 309, relied on by the plaintiff in this connection, does not lay down the true rule. *McNicholas* v. *Prudential Ins. Co.* was not a decision on the point now under consideration. In that case a receipt not under seal was given by the plaintiff for the money received by her. It is not necessary now to consider further the statement there made. The true rule is laid down in *Freedley* v. *French*, 154 Mass. 339, namely, that where the person to whom the release is given undertakes to state the contents of it and conceals a part of them, a fraudulent misrepresentation is made out.

1. So far as the representation goes that the defendant's agent had been to the other houses and all the ladies had signed the paper, or that he went to all the houses and they signed (it was put both ways in the testimony), there was no evidence that this was not the fact. Four of the plaintiff's fellow passengers who were put on the witness stand by her testified that they had signed a release. So far as appears, therefore, this statement was true. The statement did not mean that all the other women

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signed the identical piece of paper signed by the plaintiff. If all of them had signed a release the truth of this statement was made out.

2. The plaintiff did not testify that the defendant undertook to state the contents of the release. She did not testify that the $5 given her was paid to her to pay her doctor and so bring the case within *Bliss* v. *New York Central & Hudson River Railroad*, 160 Mass. 447. What the plaintiff testified to was that the defendant's agent said that the $5 given her "will pay for the doctor" not that the $5 was given her to pay the doctor.

3. Lastly, the evidence did not warrant a finding that when she signed the release the plaintiff did not know what she was about, or, as Chief Justice Parker put it, that she did not have "legal competency to act."

The accident happened "five or ten minutes after the car left Forest Hills going toward Boston." Beyond this the time of the accident was not testified to. After the accident, with the help of friends, she boarded another car which took her "near her home in South Boston." How far that was from her home does not appear. She apparently walked home without assistance. According to her testimony "she got upstairs the best she could and took her clothes off, and lay on the lounge until bell rung." How long a time elapsed from the time she lay down until the bell rang did not appear. The plaintiff's testimony is that about five minutes after she heard the bell ring, "I tried my way down the stairs, and when I got down I almost collapsed. I rested for a moment and then I went and opened the door." The defendant's agent was at the door. The plaintiff in her testimony gave an intelligent account of what then took place. She testified that after the defendant's agent left "she was then in a very weak condition." But her testimony went no farther. It was about fifteen minutes after four when the agent came to the house.

The plaintiff's husband came home "somewhere around five o'clock." He testified "that he found his wife lying on the lounge, appearing very sick and weak and looking as if she had had a shock; that she was hysterical and not able to give a clear story of the accident; that she was in bed, very sick, for nine

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days." But on cross-examination he testified "that his wife told him that night what had happened; that the doctor came between five and six o'clock, and she told him about being on the car and how she got hurt, describing how the thing happened; that she told the doctor what she complained of."

The only testimony which it could be argued went far enough is that of the plaintiff's husband that when he came home "somewhere around five o'clock" his wife "was hysterical and not able to give a clear story of the accident." What was in issue was whether she understood what she was doing when she took $5 and gave a release at about fifteen minutes after four. On the stand she gave an intelligent account of that transaction; her husband testified that between five and six she "told the doctor" how she got hurt, "describing how the thing happened." She did not testify that she did not understand the transaction; the farthest that her testimony went was that after the agent left she was "in a very weak condition." As we have said, the evidence did not, in our opinion, go far enough to warrant a finding that she did not have "legal competency to act" when she signed the release.

Exceptions overruled.

HECTOR McCALLUM *vs.* SIMPLEX ELECTRICAL COMPANY.

Middlesex. November 20, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Assignment, Of wages. *Statute. Constitutional Law.*

Under St. 1905, c. 308, which provided that "no assignment of future earnings, whether made by the assignor in person or by his attorney, shall be valid unless executed in writing, for a period not exceeding two years from the date of said assignment or of any power of attorney under which said assignment is made," an assignment made February 28, 1906, of wages to be earned by a wage earner up to April 20, 1907, purporting to be executed in behalf of the wage earner by one acting pursuant to authority assumed to have been conferred by a power of attorney to do so which was executed by the wage earner on December 5, 1904, was invalid because it purported to assign earnings for a period exceeding two years from the date of the power of attorney.

There is no doubt as to the constitutionality of St. 1905, c. 308, with regard to the invalidity of certain assignments of future earnings.

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CONTRACT. Writ in the Third District Court of Eastern Middlesex dated March 29, 1906.

In the writ as amended the plaintiff was described as "Hector McCallum . . . who brings this suit for the use and benefit of Thomas F. Boyle and Edward J. Boyle, copartners doing business under the name and style of Boyle Brothers . . ."

The substituted declaration was on an account annexed for wages due to the plaintiff from the defendant for the two weeks from February 23 to March 9, 1906, at $15 per week.

On appeal to the Superior Court, the case was tried before *Lawton*, J., without a jury. There was evidence tending to show that the plaintiff owed Boyle Brothers $27.50. It was admitted and agreed that at some time previous to the bringing of this action the plaintiff had been paid in full for all services, if any, rendered to the defendant. Other facts are stated in the opinion.

The presiding judge found for the plaintiff in the sum of $28.90; and the defendant alleged exceptions.

P. M. White, for the defendant.

G. T. Perry, for the plaintiff, submitted his case without argument or brief.

RUGG, J. This is an action of contract to recover wages alleged to be owing to the plaintiff for labor performed for the defendant for two weeks from February 23, 1906. The plaintiff began his employment with the defendant on February 16, 1906. On December 5, 1904, he executed and delivered to Boyle Brothers (for whose benefit this action is brought) an instrument, which purported to be a power of attorney, authorizing them or any person they might substitute to execute and deliver an assignment of his wages. By instruments dated on June 13, 1904, and on December 1, 1904, Boyle Brothers undertook to appoint one Plunkett their attorney to execute assignments. Apparently acting pursuant to the authority assumed to be conferred by one or the other of these instruments, Plunkett by a writing dated on February 23, 1906, executed a form of assignment of the wages of the plaintiff while in the employ of the defendant to Boyle Brothers, covering the period in question. These instruments were seasonably recorded, and notice of the attempted assignment of the plaintiff's wages was given to the defendant on the day of its date.

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Interesting questions are presented as to the construction and effect of the original power of attorney executed by the plaintiff and the prior instruments signed by Boyle Brothers and the assignment in the name of the plaintiff but executed by Plunkett as his attorney. Without passing upon these, we rest the decision upon St. 1905, c. 308. This act provides: "No assignment of future earnings, whether made by the assignor in person or by attorney, shall be valid unless executed in writing, for a period not exceeding two years from the date . . . of any power of attorney under which said assignment is made." Whatever validity there may be in the assignment, executed in the name of the plaintiff by Plunkett as the attorney for the plaintiff, under date of February 23, 1906, depends wholly upon the power of attorney given by the plaintiff to Boyle Brothers under date of December 5, 1904. This assignment covered an entire and unbroken period from its date to April 20, 1907, and was thus for a period considerably in excess of two years from the date of the power of attorney, upon the strength of which it was made. But by the express terms of the statute no such assignment for a period exceeding two years from the date of the power of attorney can be valid. It follows that the assignment of February 23, 1906, was a nullity, being in contravention of the statute. The statute went into effect before the date of the assignment, and therefore governs it.

There is no doubt as to the constitutionality of the statute. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13. *Opinion of the Justices*, 163 Mass. 589. *Commonwealth* v. *Danziger*, 176 Mass. 290. *Squire* v. *Tellier*, 185 Mass. 18. *Commonwealth* v. *Strauss*, 191 Mass. 545. *International Text Book Co.* v. *Weissinger*, 160 Ind. 349.

The St. 1906, c. 390, did not go into effect until after the occurrence of the events here in issue.

As this action depends upon the assignment executed by Plunkett, it cannot be maintained.

Exceptions sustained.

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WINNIFRED G. ROWLEY *vs.* GEORGE H. ELLIS.

Suffolk. November 21, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Words*, "Farm laborer," "Employer himself."

Under § 79 of R. L. c. 106, which provides that "the provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees," a foreman in charge of one of four farms belonging to the same owner, under the direction of a superintendent who visits each farm once a day, such foreman receiving a salary of $35 a month and having sixteen or eighteen men under him, is a farm laborer within the meaning of the statute, and, if he is killed without conscious suffering by the violent breaking of the sprocket chain of a cutting machine when he is showing the workmen how to feed corn stalks into the machine, his widow cannot recover from his employer for his death under the provisions of § 73 of the same chapter, although she shows that the accident was caused by the sprocket around which the chain passed having become worn by use, that the duty of inspecting and caring for the safety of the cutting machine was entrusted to the superintendent, and that the superintendent was negligent in not discovering the defect and causing the necessary repairs to be made.

"The negligence of an employer himself" for which he is liable under R. L. c. 106, § 73, if it results in the instant death or death without conscious suffering of an employee, does not include the negligence of one to whom the employer has delegated the duty of maintaining machinery in a safe condition, for which, among other things, the employer is made liable by the succeeding words of the same section.

TORT under R. L. c. 106, § 73, by the widow of Edward J. Rowley for causing the death of Rowley without conscious suffering on September 15, 1903, while he was in the employ of the defendant. Writ dated October 31, 1903.

In the Superior Court the case was tried before *Holmes*, J. The plaintiff introduced evidence tending to prove, among others, the following facts:

At the time of the accident which caused the death of Rowley, and for some time before, the defendant owned or leased and operated four farms in Middlesex County, one situated at West Newton, one near Oak Hill in Newton, another at Kendall Green in Weston, called the Kendall Green farm, and a fourth near the Weston and Wayland boundary line, called the Bigelow

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farm. These farms comprised in all an acreage of over one thousand acres.

The defendant operated the farms as milk and dairy farms. In addition he was the principal stockholder and managing official of a large printing and publishing business in Boston. He employed one Van Norman as superintendent over all the farms above mentioned. This superintendent had general oversight and direction of all the farms and the work done thereon. The defendant himself directed the work on all the farms and left the details to the superintendent. The superintendent saw that his employer's general orders were executed, giving his orders to the foremen of the different farms and seeing that the work was carried out in accordance with these orders. On each farm was a foreman, who had charge of the men and who received orders from Van Norman, directed the labor of the farm hands in executing the orders and supervised the farm work under Van Norman's direction. Van Norman visited each farm at least once a day. The farms all were connected by telephone and orders frequently were given by Van Norman by that means. Van Norman had his headquarters at the West Newton farm.

Rowley was the foreman at the Kendall Green farm. He first was employed by the defendant in 1895 as foreman of a farm in Concord, Massachusetts, then owned and operated by the defendant. Rowley remained at Concord until 1900 when he went to Weston as foreman of one of the farms. In 1901 he went to Kendall Green and remained there as foreman until the time of his death. The number of farm hands on this farm varied with the seasons. In the winter, when there were fewest, there were from six to eight men, and in the summer the number was doubled. At the time he was killed there were sixteen or eighteen men under him.

He received a salary of $35 per month. Before Rowley was employed by the defendant he had worked about cattle and understood their care, as the defendant knew. While employed by the defendant he had charge of the care of a large number of cows on the farm of which he was foreman. He was not a mechanic.

Beginning some time in September of each year, a part of

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the work on each farm was the cutting of ensilage and storing it in a silo. This was done in the following manner: The growing corn first was cut and then was carried to a cutting machine, which was set up on the farm. In this machine the corn stalks were cut into small pieces of about one half an inch in length. This corn, so cut, then was deposited immediately in the silo, which was a cylindrical receptacle, built of wood, with hoops, about thirty feet high and twelve or fifteen feet in diameter. The cutting machine was about five or six feet high and fifteen or twenty feet long. The cutting was done by knives set in a cylindrical shaft, which revolved. This shaft was driven by a belt connecting it with the engine which supplied the power.

In operating the machine a bundle of corn stalks first was laid lengthwise in the feed box. The moving belt in the feed box carried the corn stalks toward the knife. As they neared the revolving knife, a carrier from above pressed the stalks flat and carried them over rollers to the knife. The chopped material fell from the knife into a small carrier on the other side which deposited it upon an inclined carrier, which in turn conveyed it to the top of the silo. The knife was turned by a belt which ran from a pulley on the knife shaft to the engine. The other moving parts of the machine all were operated by a shaft, which received its power from the shaft revolving the knife. The power was communicated from the shaft last named to the shaft turning the belt, rollers and carriers by means of an endless chain, formed of detachable links which passed over two sprocket wheels, one fixed on each shaft. The sprocket wheel fixed on the knife shaft was one third or one fourth as large as the other one and was called the high speed sprocket. These sprocket wheels had teeth or cogs, each tooth of which fitted into the opening of a link in the sprocket chain. The sprocket wheels were made of cast iron, the chain of malleable iron. When in operation the small sprocket made about six hundred revolutions per minute. The proper place for the person feeding the corn into the machine was alongside the feed box on the same side as the sprocket chain. The sprocket chain had no covering.

The accident occurred on Tuesday, September 15, 1903. On

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the Friday or Saturday preceding, Van Norman was ordered by the defendant to begin the cutting of ensilage. Van Norman directed Rowley to get out the cutting machine, which was stored in the barn at Kendall Green. The machine was taken to the Bigelow farm, which was two or three miles distant, and set up in the corn field. A portable steam engine was sent out from Boston and connected with the cutting machine. On Tuesday, September 15, the machine was ready to run and was started up for trial and was run a few minutes without anything in it. Then some "loose stuff" was put through the machine, which ran apparently all right. There were present Rowley, one Foster, a teamster, one Garnis, another teamster, who had been sent over to the Bigelow farm that morning by Van Norman, one Jones, the engineer in charge of the engine, and eight or ten Italian laborers, who had been hired temporarily by the defendant.

After the machine had been tried for a few minutes, as described, a load of corn stalks came on the wagon of Garnis. Rowley was standing at the side of the feed box, on a platform provided for that purpose, on the side of the sprocket chain, and was showing the Italians how to feed the corn into the box. Corn was being fed into the box and was being cut, when the sprocket chain broke with great violence, and a piece of the chain composed of three links hit Rowley on the top of the head, cutting it open and exposing the brain. He fell to the ground unconscious and was carried to the Waltham Hospital, where he died a short time afterwards on the same day, without regaining consciousness.

At the time he was injured the cutting machine had been in operation not more than five minutes. It was running at an ordinary and proper rate of speed and the proper and usual quantity of corn was being fed into it; there was no more than the usual strain upon the machine and engine, and nothing had got into the machine to stop or clog it.

The machine was purchased by the defendant in 1897 from Joseph Breck and Sons of Boston. It was a Ross machine, first class when new. It was set up in 1897 at Kendall Green by one Parker, an employee of Breck and Sons, in the presence of the defendant and Van Norman, who assisted Parker. It had been

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used every year since that on all the farms above described for all the ensilage cutting, having been moved from farm to farm. In 1902, Rowley had been confined to the house by illness during all the time the cutting machine was in use. One of the links which struck Rowley was produced at the trial, identified and introduced in evidence. The hook end of the link was twisted and half broken off. There was other evidence in regard to the cause of the accident, the findings warranted by which are stated at the beginning of the opinion.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, which, after the death of *Holmes*, J., were allowed, with the consent of counsel, by *DeCourcy*, J.

F. H. Chase, (*H. A. Guiler* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

LORING, J. In this case the jury would have been warranted in finding that the accident here complained of was caused by one of the sprockets becoming worn so that it was hooked; that where a sprocket is hooked, the chain, when it passes around the wheel on the sprockets, in place of leaving the sprocket as it should do, is held by the hook of the sprocket and the link so held receives the full power of the engine and breaks with great force. The jury would have been warranted in finding also that the duty of inspecting and caring for the safety of the cutting machine in question was entrusted to Van Norman, and that Van Norman was negligent in not discovering the hook in the sprocket and causing the necessary repairs to be made.

There was no pretence here that the defendant had been negligent in selecting Van Norman, to whom the care of the machine was delegated.

The case therefore is one in which, had the plaintiff's intestate not been killed, there would have been a remedy both at common law and (apart from § 79) under R. L. c. 106, § 71, cl. 1. *Ryalls* v. *Mechanics Mills*, 150 Mass. 190. *Lynch* v. *M. T. Stevens Co.* 187 Mass. 397.

The plaintiff's argument in support of her contention that the case at bar falls within the first clause is that at common law the negligence of one to whom is delegated the duty of maintaining in a safe condition the machinery used by his employers is by

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legal intendment the negligence of the master, and that death caused by such negligence is the result of the negligence of the master himself within the first clause of what is now § 73.

In the accurate use of words the negligence of a third person for which a defendant is liable is not the negligence of the defendant. And this is intensified by the wording of § 73, namely, "the negligence of an employer himself."

Further it is manifest that the class described in the second clause of § 73 is a class in contradistinction to those described in the first clause, and since the case at bar plainly falls within the second, it does not *prima facie* at least fall within the first.

But the plaintiff's intestate was killed, and the only statute which makes the defendant liable for his death is R. L. c. 106, § 73.

Had the plaintiff's intestate not been a farm laborer the case made out would have been a case where his death was the result of the negligence of a person for whose negligence the defendant is made liable by force of R. L. c. 106, § 71, cl. 1, and so within the second clause in R. L. c. 106, § 73.

We are of opinion however that although a foreman the plaintiff's intestate was a farm laborer within R. L. c. 106, § 79, and by force of that section the defendant is not liable under the second clause of § 73.

The plaintiff's contention is that the case made out by her is within the class described in the first clause of § 73 as well as within the second clause of that section.

It recently has been decided by this court in construing a similar statute imposing a penalty for wrongfully causing the death of another, (St. 1886, c. 140, now R. L. c. 111, § 267,) that words are to be taken in their ordinary meaning and not in that given to them as matter of legal intendment. Where a plaintiff while helpless is injured by the negligence of another he can recover because the injury is not caused by an act of contributory negligence on his part. It is commonly said that the allegation that he was in the exercise of due care is proved in such a case as matter of legal intendment. See *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448. In spite of that it was held by this court that a man who is killed while helpless through the gross negligence of the defendant's servants

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is not in the exercise of due care within the meaning of those words in what is now R. L. c. 111, § 267. *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510.

The decisive answer to the plaintiff's contention however is that if he is right § 73 makes the employer liable if death results from any negligence for which he is liable, whether his own or that of another and whether he is liable under the statute or at common law. If that had been the intention of the Legislature the liability would not have been restricted to cases where death is the result of the negligence of an employer himself or of a person for whose negligence an employer is liable under the provisions of § 71.

Exceptions overruled.

HARRY J. JAQUITH, assignee, *vs.* JOHN DAVENPORT.

SAME *vs.* JOSEPH H. MORRILL.

Suffolk. November 21, 22, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Insolvency, Fraudulent preference.

In an action by an assignee in insolvency to recover the value of goods alleged to have been transferred by the insolvent as a fraudulent preference, it cannot be found that transferring goods of the insolvent into the name of a broker's clerk, falsely stating that they are his, and then selling them as the clerk's when they are not his, is a sale in the usual course of business of the insolvent.

In an action by an assignee in insolvency to recover the value of certain cigars alleged to have been transferred by the insolvent as a fraudulent preference, it appeared that the defendant was and had been for many years a teamster, that a merchandise broker, who was a creditor of the insolvent and knew the defendant, summoned the defendant by telephone to meet him at a certain hotel and, on his doing so, told him, in the presence of the insolvent, that he wanted to sell some cigars that the insolvent was overstocked on, as the insolvent wanted some ready money, that the insolvent "needed some money and wanted some help," that the broker led the defendant to expect that he would make some money on the cigars if he bought them, that thereupon the defendant bought the cigars and paid the broker for them, and that the broker kept the money, which went to him or to his shippers, who also were creditors of the insolvent. *Held*, that this transaction could not be found to be a sale in the usual and ordinary course of business of the insolvent.

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In an action by an assignee in insolvency of a firm consisting of two partners to recover the value of goods alleged to have been transferred by the insolvent firm as a fraudulent preference, upon the issue whether the defendant at a certain time had reasonable cause to believe that the firm was insolvent, knowledge of the insolvency of the firm is not shown as matter of law by showing knowledge that at the time in question one of the partners was insolvent or in contemplation of insolvency, if at that time the other partner was in good financial standing.

An assignee in insolvency cannot recover as a fraudulent preference the amount paid by the insolvent on notes indorsed by him, if the payments in question were made by the insolvent with funds furnished to him for the purpose by the makers of the notes.

TWO ACTIONS OF TORT, by the assignee in insolvency of the joint and several estates of Henry A. Davis of Malden and Henry C. Hathaway of New Bedford, copartners under the firm name of H. A. Davis and Company, respectively against John Davenport and Joseph H. Morrill, for the value of certain goods and certain sums of money alleged to have been delivered and paid to the defendants as fraudulent preferences. Writs dated respectively October 1, 1897, and May 26, 1897.

These two cases, together with a third case against one Antonio F. Rico, by order of the Superior Court were sent to an auditor, and, after the filing of his report, were tried together before *Stevens*, J., without a jury. He found for the defendant in each of the cases, and the plaintiff alleged exceptions. The exceptions in the case against Rico were overruled, but those in the cases against Davenport and Morrill were sustained, in a decision reported in 191 Mass. 415.

The cases against Davenport and Morrill were tried again before *Hitchcock*, J., without a jury. The material facts are stated in the opinion. The judge found for the defendant in each of the cases; and the plaintiff alleged exceptions, raising the questions which are stated in the opinion.

W. R. Bigelow, for the plaintiff.

C. W. Bartlett & A. T. Smith, for the defendants.

LORING, J. These are two of the three actions before this court in *Jaquith* v. *Davenport*, 191 Mass. 415. The action against Rico then before the court was disposed of by the decision made at that time. The other two cases went back for a new trial and are now before us on exceptions taken there.

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The action against Davenport is an action by the plaintiff as assignee in insolvency of the joint and separate estates of Henry A. Davis and Henry C. Hathaway, doing business as partners under the firm name of H. A. Davis and Company, to recover for two sales and three payments of cash as transfers and payments made in fraud of the insolvent laws. The action against Morrill is for the proceeds of one sale of cigars on the same ground.

The principal but not the only question raised by this bill of exceptions is that to the refusal of the judge to rule that the three sales were sales not made in the usual course of business of the insolvents.

1. The petition against Davis and Hathaway was filed on April 25, 1896. The two sales to Davenport were made on March 11, and March 31, 1896. The three payments to Davenport (which at the trial had also a bearing on the validity of the sales to him) were made on November 1, 1895, November 3, 1895, and December 12, 1895. The two sales to Davenport are the subjects of counts two and three, and the three payments are covered by counts four, five and six of the declaration in the action brought against him.

The circumstances leading up to the two sales and the three payments to Davenport are in substance as follows:

Some time in 1893 Davis and one Chard, doing business under the firm name of Chard and Davis, failed. At that time one Oliver borrowed $10,700 of the defendant Davenport, "to settle the insolvent affairs of Chard and Davis, . . . and to help Davis through financial straits." For making this loan to him Oliver paid Davenport a bonus of $1000. Davenport testified that on March 12, 1896, the balance then due on this loan (originally for $10,700) was $3,275.14.

The three payments here in question come first in the chronological order, and we will state the facts in that connection before taking up the two sales to this defendant.

The first payment complained of came about as follows: One Kelman made a note payable to and held by the insolvents. They indorsed it to Oliver, and Oliver indorsed it to the defendant Davenport, with the agreement that anything received on it should be credited on the balance due on the loan originally of

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$10,700. The note was protested at maturity and afterwards was paid to Davenport by the insolvents as indorsers, and the amount received was credited on March 12, 1896, on the note for $3,275.14, the balance then due on the original loan of $10,700. This payment amounted to $61.02, of which $1.50 were protest fees. This payment was the subject of the fourth count.

The other two payments were similar. The second payment (the subject of the fifth count) was for $60 paid by Davis and Company as indorsers at maturity to the defendant Davenport, the holder by indorsement from Oliver who received it from Davis and Company. The third payment, $300 in amount (the subject of the sixth count), also was paid by Davis and Company as indorsers at maturity. These two notes were received under the same agreement from Oliver, and the proceeds were credited on the balance due on the original loan of $10,700.

The plaintiff's contention was that the original loan of $10,700, although made in Oliver's name, really was made to Davis, and that these notes were transferred through Oliver to the defendant Davenport (the transfer to Oliver being without consideration) to be credited when paid on the debt due from Davis to Davenport. As we have said, these payments were made on November 1, November 8 and December 12, 1895, but were not credited on the note originally for $10,700 until March 12, 1896.

The auditor found that during all this time "Davis" personally was insolvent. No attempt was made to control this finding by evidence at the trial.

The date of the first sale of cigars to Davenport was the day before these three payments, made between three and four months previously thereto, were credited on the Oliver note held by Davenport. The other sale was twenty days later, on March 31, 1896.

The auditor found that "Davis had been financially irresponsible" since the insolvency of Chard and Davis in 1893 "to his present insolvency." In November, 1895, and perhaps early in October, 1895, Davis and Hathaway began a course of dealing in which the auditor found that Davis and Hathaway were

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partners. This finding was not controverted at the trial. This course of dealing is described by the auditor as follows: "Hathaway, whose rating in the books of the commercial agencies was good at that time, made notes, leaving large numbers of them, signed in blank in the hands of Oliver, who was their joint agent, and who, or whose bookkeeper and agent, one Von der Heide, filled them out as occasion required, and Davis then bought goods with these notes signed by 'Davis & Co.' and indorsed by Hathaway. The goods so bought were sent to Oliver ostensibly as Hathaway's goods, were sold by Oliver or pledged on notes signed or indorsed by Oliver, and often these goods were sent direct from the depot or wharf to Oliver's store or to Hathaway's room in the warehouse, and often goods were sent from Hathaway's or Davis's store to Oliver's."

On March 11, 1896, and March 31, 1896, cigars bought in the course of dealing above described were sold to the defendant Davenport. The plaintiff introduced evidence that the two lots of cigars were worth $1,870 and $1,390, and were sold for $1,160 and $1,000 respectively. The plaintiff's contention was that the difference of $1,100 between the true value and the purchase price was a payment to Davenport on the original loan of $10,700. The amount then due on that loan (according to Davenport's testimony) was $1,972.30, after the three payments mentioned above and some others had been credited on March 12, 1896. His contention is that the transfer, having been made to give this preference to Davenport, was void. It appeared from the schedules of the insolvents that their assets amounted to $50 and their debts to $29,722.50. The judge was warranted in finding that $29,722.50 was to some extent at least due for cigars bought and not paid for.

The defence, or at any rate the main defence, set up to this claim was that these goods were sold honestly by Davis or Hathaway, or Davis and Hathaway, to Von der Heide, and by him were sold through Oliver as a broker to the defendant. Von der Heide, for seven or eight years before the date of these sales, had been, then was and thereafter for four or five years continued to be, Oliver's bookkeeper. He had no place of business of his own.

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If the judge had believed that the two lots of cigars sold to the defendant were in reality the property of Von der Heide and not the property of Davis or Hathaway or Davis and Hathaway standing in Von der Heide's name, when they were sold to the defendant, the request to rule that these sales were "not in the usual course of business of Hathaway" would have been rightly refused as immaterial. If the cigars were really Von der Heide's cigars, no question could arise as to the sale to Davenport being or not being in the usual course of the business of Hathaway or Davis or Davis and Hathaway.

But on this record it must be taken that the judge found that the cigars were the property of Hathaway or Davis or Davis and Hathaway at the time of the sale in question, and were not the cigars of Von der Heide; for in his finding he states of all five counts that the plaintiff must prove (1) "insolvency or contemplation of insolvency . . . of Davis and Hathaway at the time of the sales of the goods and at the time of the payments referred to"; (2) "an intention at the time of the sales of the goods and the payments" to give a preference; and (3) "knowledge on the part of the defendant, or reasonable cause to believe, Davis and Hathaway, or either of them, to be then insolvent, or in contemplation of insolvency or to believe that such sales and payments were made in fraud of the laws relating to insolvency." The judge then states in his finding that "The plaintiff fails to sustain the burden incumbent upon him upon the third point and it is found as a fact that the defendant did not have reasonable cause to believe that Hathaway or Davis were insolvent at the time of the purchase of the goods, or that the sales or conveyances were made in fraud of the laws relating to insolvency, or that the payments were made in fraud of the laws relating to insolvency."

In that status of the case the rulings asked for were material and should have been given.

It is too plain for argument that transferring goods into the name of the broker's clerk, falsely stating that they are his (the clerk's) and selling them as the clerk's when they were not his, is not a sale in the usual course of business of the true owner.

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2. The exceptions taken to the refusal to give the fourteenth and fifteenth rulings* asked for must be sustained.

Morrill was and had been a teamster for about thirty years, and he lived out of town. He had known Oliver since he was an errand boy in a grocery. On being asked by Oliver on the telephone to do so, he went to the Hotel Reynolds in Boston, "some time in February, 1896," and met him, Oliver, and Hathaway. Oliver told Morrill that he "wanted to sell some cigars that Hathaway was overstocked on, he claimed, and wanted some ready money." Morrill testified that "Oliver told me Hathaway's circumstances, that he needed some money and wanted some help." Oliver led him to expect to make some money on the cigars if he bought them. Thereupon he bought the cigars and paid Oliver for them. The evidence stated in the bill of exceptions showed that this money went to Oliver or Oliver's shippers, to both of whom Hathaway or the firm then were indebted.

Without question the transaction was not in the usual course of business of Morrill. But that is not the question. The question is whether the sale was one not made in the usual and ordinary course of business of Davis and Hathaway.

Again, the question is not whether the sale was one not in the usual and ordinary course of business throughout the community, but whether it was one not in the usual and ordinary course of business of the insolvents as the insolvents carried on their business. Hoar, J., in *Nary* v. *Merrill*, 8 Allen, 451, 453.

And lastly, the question before us is not whether the judge could have found the transaction to be one not in the usual course of the business of Davis and Hathaway, that is to say, a case where the judge could have found one way or the other on the evidence, as in *Killam* v. *Peirce*, 153 Mass. 502. The ques-

* The rulings held to have been refused erroneously were as follows:

"14. The conveyance of the cigars in Exhibit B was not in the usual course of business of Hathaway, and the defendant upon all the evidence is held to have reasonable cause to believe that Hathaway was then insolvent or in contemplation of insolvency.

"15. The conveyance of the cigars in Exhibit C was not in the usual course of business of Hathaway, and the defendant upon all the evidence is held to have reasonable cause to believe that Hathaway was then insolvent or in contemplation of insolvency."

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tion here is whether on the evidence he was bound to find as matter of law that the sale was not in the usual course of the business of Davis and Hathaway, and so in the class of cases like *Nary* v. *Merrill*, 8 Allen, 451.

There is little or no evidence in the bill of exceptions as to what the usual course of business of Davis and Hathaway was. The auditor found that they bought tobacco through Oliver with the proceeds of notes signed or indorsed by Hathaway (whose credit was good while that of Davis was bad), and sold this tobacco through Oliver. The auditor found that the tobacco was stored sometimes in Oliver's store and sometimes in "Hathaway's room in the warehouse." Von der Heide testified that "Hathaway's goods were stored in a private room at the Metropolitan Warehouse Company in Boston, and that Oliver kept the key to the room, and that none of the goods were kept in Oliver's store."

Apparently neither Davis nor Hathaway had any place of business.

The fact that the sale was made by Oliver as a broker outside of Oliver's store would not make the sale one not in the usual course of the business of the insolvents.

Neither is the fact that Oliver told Morrill that Hathaway was overstocked and wanted some ready money, enough.

But taking all the circumstances together, the fact that Morrill was summoned by telephone or telegraph from out of town, and that he was summoned to the Hotel Reynolds and there met both the principal and the broker, and was told that the goods were sold at a bargain because he was overstocked, and that the purchase money was paid to Oliver and not to the insolvents, we are of opinion on the whole that the sale, as matter of law, was not in the usual and ordinary course of the business of the insolvents.

3. The judge could refuse to give ruling 15 a* as immaterial.

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* The ruling referred to was as follows:

"15 a. If the defendant knew that Henry A. Davis was insolvent or in failing circumstances in 1893, and no evidence appears of any change in his financial condition thereafter, the defendant is presumed to have reasonable cause to believe that Henry A. Davis was insolvent or in contemplation of insolvency in the Fall of 1895 and the first three months of 1896."

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The issue on that was whether the defendant had reasonable cause to believe that Davis and Hathaway were insolvent or in contemplation of insolvency in the autumn of 1895, and the first three months of 1896. Hathaway was in good financial standing until the insolvency in April, 1896. The financial strength brought to the firm by him was left out of account in this request for a ruling.

4. We are of opinion that the judge could admit the testimony of Manning as to the value of the cigars in the box admitted in evidence at the former trial. It was enough to make the evidence competent that the box was then admitted. Since there were fourteen brands of cigars in question in the Morrill case (in which we understand this testimony was offered), varying from $11.50 to $50 a thousand, this evidence would seem to be of little or no weight unless further evidence of its connection with the case was put in.

5. The judge in his discretion could exclude the evidence that neither H. A. Davis and Company nor Hathaway ever complained of the quality of the tobacco bought by them. The plaintiff insists that this was evidence that the tobacco was worth what Davis and Company paid for it. That evidence might have some tendency to prove that fact. But it is very remote. Moreover, if, as the plaintiff contends, the insolvents were buying tobacco to sell to favored creditors at less than its true value, or to sell to others and use the proceeds to pay favored creditors, they would not care what they agreed to pay for it.

6. The judge found that the three payments in question in counts four, five and six in the action against Davenport were made with funds furnished by the makers of the notes. On the finding the money so furnished was paid to Davis and Company, not as their money, but as the money of the makers in trust to be applied in paying the notes then held by others. Since that was the fact the fraud, if any, consisted in the transfer of the notes, not in their payment. Ruling 15 b * was properly refused.

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* The ruling referred to was as follows :

"15 b. If the court finds that Henry A. Davis and Company or Henry A. Davis individually received payment from the makers of the Kelman note, the O'Neil and Hart note, and the C. F. Clark and Company note, or any of

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7. To prove that the price paid by Morrill was not less than the true value of the cigars bought by him he introduced evidence that he made $128 profit on this purchase of $4,000. To supplement this he was allowed to prove by Oliver that he had to resell some of the cigars several times. This tended to show that they were not resold without regard to their true value, and in this connection the evidence was competent.

The result is that the entries must be

In the case against Davenport

On counts 2 and 3: *Exceptions sustained.*

On counts 4, 5 and 6: *Exceptions overruled.*

In the case against Morrill: *Exceptions sustained.*

THOMAS McKENNA *vs.* GOULD WIRE CORD COMPANY.

Norfolk. November 22, 1907. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability. *Evidence, Res gestae*, Admissions and confessions. *Agency.*

In an action by an engineer in a wire cord factory against his employer for personal injuries, it appeared that the plaintiff had worked as an engineer for eighteen or nineteen years and had been employed as an engineer in the defendant's factory for about eighteen months and at times had served as a helper to the superintendent, that the superintendent sent him to get something from a storeroom in the basement of the factory, which was low, dimly lighted and very noisy from machinery both there and on the floor above, that in order to go to the storeroom he had to stoop to pass under the shaft of a blower which was two and a half or three feet from the ground, that, when he passed under the shaft, it was not in motion, that on his return from the storeroom he attempted to pass under the shaft in the same way, but it had been started, by the superintendent who sent him to the basement, and was making three hundred and twenty revolutions a minute, that the light was so dim and the noise so great that the plaintiff did not see or hear that the shaft was in motion, and had heard no signal of its starting given by a bell or orally, and as he stooped to go under the shaft two set screws in the coupling of the shaft caught the clothing at the back of

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them, before the payment by Davis and Company to Davenport for those three notes as declared on in Counts 4, 5 and 6 of the declaration, such facts would be no defence based on the ground that the insolvent assets were not thereby diminished."

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his neck and he was whirled around the shaft and was injured. There was a regulation that this shafting should not be started without a signal being given by an electric bell or orally, but the plaintiff testified that while he was in the basement he was not within hearing distance of the bell. It appeared that the blower was used to heat the factory, and that the accident happened in midwinter. The plaintiff testified that while the blower was in use, through the cold weather, he had to go down into that part of the basement half a dozen times a day to change the steam, that he oiled the bearing on the blower sometimes once a day and sometimes once in two or three days, that the blower was about twelve feet from the shaft, that he knew the shaft was there, but never had been close to it and had no knowledge that there was a coupling on it that had projecting set screws. *Held*, that as matter of law the plaintiff could not recover, the dim light and the noise in the basement and the set screws in the coupling of the shaft being permanent and obvious conditions of his employment, with which he was or might have been familiar, and of which he accepted the risk; moreover, that there was no evidence of negligence on the part of the superintendent in starting the shafting of the blower when he had sent the plaintiff to the basement, as he reasonably could not have been expected to foresee that an experienced employee so often in this part of the basement would not be guided by his usual experience at this season of the year as to finding the blower shaft in motion; and that whether the signal by electric bell or orally was given or not was immaterial, as the plaintiff could not have relied on the absence of the signal, knowing that he was where he could not hear it if given.

In an action by an engineer in a factory against his employer for personal injuries alleged to have been caused by the negligence of a superintendent of the defendant in starting a blower with a revolving shaft in the basement of the factory, after he had sent the plaintiff there on an errand which compelled him to pass under the revolving shaft by stooping, in doing which he was caught by fixed screws on the shaft and was injured, the plaintiff's wife testified that, immediately after the injury to her husband and before he was removed from the factory she had a conversation with the defendant's superintendent, and the plaintiff offered to show that the superintendent then stated to the witness that if he, the superintendent, had not been so lazy the accident never would have occurred. The statement did not tend to contradict any testimony of the superintendent. The judge excluded the evidence. *Held*, that the exclusion was right; that the statement was not a part of the *res gestae*, being a mere narration of a past event, and was not admissible as an admission because it was not within the scope of the authority of the superintendent.

TORT for personal injuries, with counts at common law and under the employers' liability act. Writ dated May 14, 1903.

In the Superior Court the case was tried before *Bell*, J. The plaintiff was injured on December 26, 1902, in the basement of the defendant's wire cord factory at Hyde Park, situated on a lot of land which slopes from River Street to a stream called Mother Brook. The main basement was about one hundred feet long by fifty feet wide, its floor being the natural ground, which sloped downward from the front wall of the basement to the

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rear. On the floor above were over three hundred machines which were used in the business of manufacturing wire cord. In the basement were many shafts, counter shafts, belts and pulleys, besides brick piers, pipes and a blower. A storeroom was in one corner. There was but little head room in any part of the basement, but there was more near the rear wall on account of the slope of the land. There was evidence that in no part of the basement could a man stand upright but had to walk in a crouching position; that the light in the basement was dim, and that the machines above and the shafting, belts and pulleys below made the basement very noisy. One McSweeney was a superintendent of the defendant, within the meaning of the employers' liability act.

The plaintiff testified as follows: On December 26, 1902, he was in the employ of the defendant at its factory as an engineer, and had been so employed for about eighteen months previously, and at times served as helper to the superintendent, McSweeney, in addition to his duties as engineer. The engine room was a shed attached to the basement in the rear of the building. About nine o'clock in the morning of the day of the injury, he was ordered by McSweeney to go into the basement and get for him, from the storeroom in the further corner, two cakes of wax which were used in the work, each cake being about eighteen inches square and four inches thick. In the presence of the superintendent and pursuant to his direction, the plaintiff went downstairs, following the only way there was at that time, passed through the engine room, then through a door into the basement, and along a path trodden in the ground, and along a plank walk, stooping under a shaft connected with a blower. The shaft was not in motion when he was ordered to the basement, or when he went under it on the way to get the wax, and he supposed it was in the same condition when he was coming back. Only the superintendent, or one Gould, a son of the president of the company, operated this shafting. Gould was not at the factory that day. There was a regulation that this shafting should not be started without a signal given by an electric bell or orally. The plaintiff did not hear any signal while he was in the basement. He got the wax and, while immediately coming back by the same route, stooped to go under the shaft, when

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something which he afterwards ascertained to be set screws in the coupling on the shaft caught him by the clothing at the back of his neck and he was whirled around and around the shaft and was injured. The plaintiff was not aware that the shafting was in operation when he stooped to go under the shaft; the light was so dim that he could not see that it was in motion, and the three hundred or more machines on the floor above, and the shafting, belts and pulleys in the basement made so much noise he could not hear it running. No signal had been given to him, and the superintendent who had sent him to the storeroom was the only one there that day who operated this shafting. The plaintiff did not know that there were set screws projecting from the coupling. The shafting was set in motion from the floor above, near where the superintendent was when he ordered him to go into the basement.

On cross-examination the plaintiff testified that he had worked as an engineer for about eighteen or nineteen years, that while the blower was in use, through the cold weather, he had to go down into that part of the basement half a dozen times a day; that he went there to change the steam; that he oiled the bearing on the blower; that the bearing on the blower was about twelve feet from the shaft; that he knew the shaft was there, but he had never been close to it; that he had never had anything to do with shafting practically, that an engineer's duties do not require that; that a little piece of shafting might have been in the engine room, such as for driving a pump or something of that sort, — that that had been his limit; that the shaft on which he was injured was two and one half or three feet from the ground; that he oiled the bearing on the blower sometimes once a day and sometimes once in two or three days; that there was a lamp and a lantern in the engine room but no chimney for them; that the blower was about twelve feet from the shaft; that he started up the power about six o'clock every morning, and part of the machinery would run continuously throughout the day, but the blower machine did not; that the purpose of the blower was to heat the building; that McSweeney, the superintendent, and Gould ran the blower; that the only time the plaintiff had anything to do with it was in the morning after the return got hot he would go up

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stairs and shift the belt over, and after that McSweeney or Gould would take care of it, starting it up or stopping it as they liked; that he never had anything to do with the blower, except as described; that he never had been for wax in the basement before the time he was injured; that he had been down to put on the steam at half past six that morning within twelve feet of the shaft and that he did not take a lamp or a lantern.

On re-direct examination the plaintiff testified that there was a little window about fifteen feet away from the shaft, and at the shaft the light was very dim; that one could see hardly anything; that McSweeney had charge of the machinery; that the blower was not running when the plaintiff went down for the wax; that he passed the blower on his way to get the wax and before reaching the shaft which he went under; that the plaintiff did not hear any oral signal that the blower was to be started; and that while in the basement he was not within hearing distance of the bell. The plaintiff, on being recalled, testified that at the time he was hurt, or any time before, he had no knowledge of there being a coupling that had set screw projections, in the basement. In reply to a question by the judge he stated that on his engine there was one set screw to hold the key.

The wife of the plaintiff testified that immediately after the injury to her husband, and before he was removed from the factory, she had a conversation with the defendant's superintendent, McSweeney. The plaintiff offered to show that the superintendent then stated to the witness that if he, the superintendent, had not been so lazy the accident never would have occurred. The judge excluded this evidence, and the plaintiff excepted.

At the close of the plaintiff's evidence, the judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. E. Cotter, (*E. C. Jenney* with him,) for the plaintiff.

J. A. Lowell, (*J. Lowell* with him,) for the defendant.

RUGG, J. There is nothing in the circumstances of this action to distinguish it in principle from the many other set screw cases in which defendants have been held not liable for injuries re-

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ceived by an employee. The subject has been so recently and fully discussed, with ample review and citation of authorities, in *Mutter* v. *Lawrence Manuf. Co.* 195 Mass. 517, that it is unprofitable now to traverse the ground again. Touching the dim light and necessity of stooping to go under the shaft, it can only be said that these were permanent conditions, obvious to the eye, and with which the plaintiff was or might have been familiar, and which were the same at the beginning of the plaintiff's employment as at the time of the accident. There was no legal obligation on the part of the employer to change his structure, although it would thereby have been rendered safer. One of the implied terms of the contract of employment was that the work should be performed with the permanent arrangements then existing. *Gleason* v. *Smith*, 172 Mass. 50. *Lemoine* v. *Aldrich*, 177 Mass. 89. *Chisholm* v. *Donovan*, 188 Mass. 378. The Legislature has made ample provision for the remedy of such unwholesome conditions as appear to have existed in the defendant's factory, but no step seems to have been taken to enforce liability under the statute. R. L. c. 104, §§ 41 and 50 (see now St. 1907, c. 503, § 2, c. 537, § 5). *Foley* v. *Pettee Machine Works*, 149 Mass. 294.

The plaintiff was injured by the shaft of the blower which was started by the superintendent after he had sent the plaintiff on the errand, on his return from which he was hurt. It may be assumed that the act of starting the blower, upon all the evidence, was an act of superintendence. *McPhee* v. *New England Structural Co.* 188 Mass. 141. Although it was customary to announce, by oral or electric signal, the starting of the blower, yet this must have been for some other purpose than that of warning those in the basement that it was about to start, for the conditions were such that the usual warning could not be heard there. Therefore the plaintiff could not have relied upon its being given, and *Carroll* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 237, and cases of that class are not in point. The plaintiff testified that while the blower was in use in cold weather he was in the part of the basement where he went just before the accident "half a dozen times a day." The accident happened on December 26, and was therefore at a season of the year when this machine, which was for heating the factory, must

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have been constantly in use. In view of these circumstances it cannot be said that the superintendent was negligent in starting the blower. He could not reasonably have been expected to foresee that an experienced employee so often in this part of the basement would not guide himself by his usual experience at this season of the year in finding the blower shaft in motion.

The evidence as to the statement of the superintendent shortly after the accident was excluded properly. It was a mere narration of a past event, not tending to contradict anything he had said in testimony, nor was it within the scope of his authority. *McDonough* v. *Boston Elevated Railway*, 191 Mass. 509. *McNicholas* v. *New England Tel. & Tel. Co.* 196 Mass. 138.

Exceptions overruled.

GILES TAINTOR *vs.* MAYOR AND ALDERMEN OF CAMBRIDGE.
SAME *vs.* CITY OF CAMBRIDGE.

Middlesex. January 6, 1908. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Damages, For property taken or injured under statutory authority. *Tax*, Assessment of betterments. *Way*, Public. *Words*, "Estimate of damages."

An order for the laying out and widening of a street, made by a city council under the law authorizing the assessment of betterments, after complying with the provisions of R. L. c. 48 in regard to notice, which takes part of the land of an abutter without allowing any damages to him or to the other persons whose lands are taken, making no declaration on the subject, is an adjudication that none of these persons is entitled to any damages, which is an "estimate of damages," and after such adjudication it is too late for the abutter to elect to surrender the whole of his land under R. L. c. 50, § 4, in order that the city council may take it if they adjudge that the public convenience and necessity require the taking of the whole of such abutting estate, as this section requires the abutter to give notice in writing of his election to surrender his land "before the estimate of damages is made."

SHELDON, J. The petitioner in the first case was an owner of land abutting on Brown Street in Cambridge. The city

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council of that city, by order approved by the mayor on December 16, 1905, took a part of his land for the purpose of widening and laying out that street, under the provisions of law authorizing the assessment of betterments. On September 28, 1906, he gave notice in writing to the respondents, constituting the board named in R. L. c. 50, § 4, that he elected to surrender all his land. Thereupon the city council passed an order, approved by the mayor December 6, 1906, that upon this notice the board adjudged "that the public convenience and necessity do not require the taking of the abutting estate for the improvements named."

The petitioner now asks that the respondents be ordered by writ of mandamus "to pass orders showing that they have adjudicated that public convenience and necessity required the taking the whole of the estate of the petitioner . . . and that they have taken the whole of said estate."

A short answer to this claim of the petitioner well might be that it affirmatively appears that the board did not make any such adjudication as is alleged, but that it expressly adjudged the contrary. As, however, a decision upon this ground would leave open the question whether, after the petitioner's notice, there was any valid taking of the whole or any part of the petitioner's land under the order of December 16, 1905, and as the whole case has been elaborately argued by the petitioner, we have preferred to consider the main question involved, whether, after the passage of the order laying out the street and taking a part of the petitioner's land therefor, he had any right to surrender his whole estate under the provisions of R. L. c. 50, § 4. If he had such right, he undoubtedly is entitled to some redress, in some form of action; if not, his attempted surrender was wholly nugatory, and could not affect in any way the validity of the original taking. The original validity of the order has been already established in previous litigation between these parties. *Taintor* v. *Mayor & City Council of Cambridge*, 192 Mass. 522.

The provisions for the laying out of streets are embodied in R. L. c. 48. They contain ample provisions to secure notice to all landowners of an intended lay-out of streets for which any of their land may be taken or injuriously affected. See §§ 3, 12,

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60, 67, 79, 88 and 94 of that chapter. St. 1904, c. 443, § 3. *Masonic Building Association* v. *Brownell*, 164 Mass. 306, 309. *Lawrence* v. *Nahant*, 136 Mass. 477. *Grace* v. *Newton Board of Health*, 135 Mass. 490, 496, 497. *Fitchburg Railroad* v. *Fitchburg*, 121 Mass. 132. And it is settled under R. L. c. 48, §§ 13, 14, 68, 94, that a failure to state that any damages have been awarded to one whose land has been taken, in whole or in part, is an adjudication that no damages have been sustained by him, which not only authorizes him to proceed at once to have the amount of his damages settled by a jury, but, except as provided in R. L. c. 48, § 28, sets in motion the running of the time within which he must so proceed if he desires to do so at all. *Janvrin* v. *Poole*, 181 Mass. 463, 466. *Phillips* v. *County Commissioners*, 122 Mass. 258, 261. *Hafey* v. *Commonwealth*, 189 Mass. 540, and cases there cited. There is nothing in *Jones* v. *Boston*, 104 Mass. 461, inconsistent with these decisions. We have assumed in favor of the petitioner that the city of Cambridge is subject to the provisions of the statute in question in spite of any special provisions in its charter, and that it would be its duty upon seasonable notice of an election under the statute either to accept the proposed surrender by the passage of suitable orders or to abandon the contemplated public improvement.

If the order in question had contained the statement that the petitioner's damages were assessed at a certain sum, there would be no doubt that the time within which he might elect to surrender his whole estate under R. L. c. 50, § 4, had expired. The same rule would necessarily be applied if the order had contained an express statement of an adjudication by the board that the petitioner was not entitled to any damages for the taking of his land. This would have been an estimate of his damages within the meaning of the statute just cited. But it is settled by the decisions already and hereafter referred to that the legal effect of the order in fixing the rights of the parties is the same as if it had contained the statement of such an adjudication and only one such adjudication can be made. *Cambridge* v. *County Commissioners*, 117 Mass. 79, 83. *Fuller* v. *Somerville*, 136 Mass. 556.

It follows that the failure in the order of lay-out passed

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December 16, 1905, to allow any damages to the petitioner or the other persons, parts of whose lands were taken for the laying out and widening of Brown Street, must be regarded as an adjudication that none of these persons was entitled to any damages. This was an estimate of damages. The petitioner's notice that he elected to surrender his whole estate was accordingly given too late; it should have preceded the order for the final lay-out of the street and the taking of his land. Nor is any injustice done to the landowner by this limitation. He has ample opportunity in the preliminary proceedings, and before the final action of the board which has the power to act, for surrendering his whole estate if he so desires. This petitioner had sufficient opportunity so to do during the proceedings which are referred to in the preamble to the order of December 16, 1905, and which are stated in the papers in *Taintor* v. *Mayor & City Council of Cambridge*, 192 Mass. 522. A careful consideration of the arguments made and the decisions referred to by the petitioner has confirmed us in the views here stated. See *Holt* v. *Somerville*, 127 Mass. 408, 409; *Barnstable Savings Bank* v. *Boston*, 127 Mass. 254; *Prince* v. *Boston*, 111 Mass. 226, 229; *Whiting* v. *Mayor & Aldermen of Boston*, 106 Mass. 89, 95; *Dorgan* v. *Boston*, 12 Allen, 223, 241, 242. The petition for mandamus must be dimissed; * and it is

So ordered.

The second case is a petition for the assessment of damages for the taking of his whole estate, which is sought to be maintained on the ground that it was the duty of the city, upon receipt of the petitioner's election to surrender his whole estate, to proceed actually to take it, and that the city is estopped to deny such a taking. To this contention it is a sufficient answer to say that not only has the proper board, instead of taking it, expressly refused so to do, but for the reasons already stated the board was under no duty or obligation to make such additional taking. Accordingly the petition cannot be maintained; and we need not consider whether there

* The case was reserved by *Loring*, J., upon the pleadings and the evidence for determination by the full court.

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was any ground upon which the evidence rejected could have been admitted.*

Exceptions overruled.

G. Taintor, pro se.

G. A. A. Pevey, for the respondents, submitted a brief.

GEORGE R. JAGOE *vs.* JOSEPH H. ROBINSON & another.

Middlesex. January 8, 1908. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Judgment. Estoppel. Pleading, Civil, Declaration. *Bond.*

At the trial in the Superior Court of an appeal from a judgment of a district court, a defendant moved to dismiss the action on the ground that it had been disposed of by a judgment in the district court at a previous stage of the case upon the sustaining by that court of a plea in abatement on the ground of the non-joinder of a second defendant, who afterwards had been made a party. It appeared from the record of the district court that, on the day on which the plea in abatement had been sustained in that court, the plaintiff had filed a motion "that the judgment this day entered be vacated" and that the second defendant be summoned in as a party, and also filed a motion that the case be continued for judgment, and that the case was continued accordingly without the entry of any judgment in favor of the original defendant. *Held*, that the motion to dismiss should be denied, there having been no such previous judgment as that referred to in the motion to dismiss, as the mere fact that the plaintiff had filed a motion to vacate a supposed judgment, referring to it as having been entered on a certain day, could not control a record which showed that no such judgment was entered.

In a declaration in an action against a surety and the principal on a bond given to prosecute a writ of review of a certain judgment against the principal, an averment that the principal failed to prosecute his writ of review to final judgment sufficiently avers a material breach of the condition of the bond. It is not necessary to describe fully the writ of review and to set out all the proceedings had thereon. Nor is it necessary to declare that any execution had issued or that any demand had been made on the principal, if there are sufficient averments that the principal had not satisfied the final judgment against him.

CONTRACT against Joseph H. Robinson as surety on a bond given by Joseph D. Waters to prosecute a writ of review in the First District Court of Eastern Middlesex. Writ in the

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* The case was tried in the Superior Court before *Hardy*, J., who ordered a verdict for the respondent. The petitioner alleged exceptions to this ruling and also to the exclusion of certain evidence, now immaterial.

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First District Court of Eastern Middlesex dated August 5, 1904.

The original declaration was as follows:

"And the plaintiff says that the defendant executed to him a bond, a copy of which is annexed to the original declaration marked A;

"And the plaintiff further says that the Joseph D. Waters mentioned in said bond has failed to satisfy the judgment originally entered and all costs accrued on the execution issued thereon; that all rights to a writ of review or further continuance of said writ against Joseph D. Waters have expired; that an execution duly issued from the First District Court of Eastern Middlesex on the twenty-fourth day of June, 1904; that the plaintiff has been unable to have a personal demand made on said Waters but has made a formal demand by letter for the payment of said execution on said Waters' attorney; wherefor the plaintiff says the defendant owes him the amount of said bond."

The bond, as set forth in the copy marked A, was in the penal sum of $100, recited that the plaintiff on June 6, 1902, had obtained a judgment in the First District Court of Eastern Middlesex against Joseph D. Waters for $50 damages and $14.82 costs, and that Waters had entered his petition in the same court for a review of that judgment, and then contained the following condition:

"Now if the said Joseph D. Waters shall satisfy the judgment originally entered and all costs accrued on any execution issued thereon if a writ of review is not granted on said petition, and if a writ of review is granted on said petition he shall forthwith prosecute a review to final judgment and shall satisfy such execution as may be issued against him on the review, or in case a special judgment shall be entered against him in accordance with Section 26 of Chapter 177 of the Revised Laws of the Commonwealth of Massachusetts, if he shall pay to the plaintiff within thirty days after the entry of such judgment the amount for which such judgment shall be entered, then this bond shall be void; otherwise the same shall remain in full force."

The defendants demurred, and answered in abatement on the ground of the non-joinder of Waters, the principal on

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the bond. The district court sustained the defendants' plea in abatement.

On the same day the plaintiff filed a motion in that court "that the judgment this day entered be vacated" and that the writ be amended by adding Joseph D. Waters as a defendant and that process issue to summon Waters into court. Afterwards on the same day the plaintiff filed another motion that the case be continued for judgment and the right of appeal be extended until the court had passed upon the motion to amend. Both of these motions were allowed by the court and process was issued ordering Waters to appear and answer.

This process was made returnable on January 14, 1905. On that day the plaintiff filed another declaration against Joseph H. Robinson and Joseph D. Waters as defendants. The defendants contended that this never was allowed by the court as an amendment to the declaration already on file. The defendant Waters filed a plea in abatement setting forth that the original action brought against the defendant Robinson had gone to judgment, and consequently that he ought not to be obliged to answer to the plaintiff's writ and declaration, and also filed a demurrer. This demurrer and the demurrer of Robinson were overruled and judgment was entered for the plaintiff.

The defendants appealed to the Superior Court. Both demurrers were overruled in the Superior Court, and both defendants appealed. The case then was tried in the Superior Court before *Hardy*, J. Before the trial the defendant Robinson filed a motion to dismiss, for the reason that judgment had been entered in the First District Court of Eastern Middlesex on the plea in abatement filed by him, and that that judgment never had been vacated. The judge overruled the motion to dismiss and the case was tried. The jury returned a verdict for the plaintiff, and the judge ordered that judgment be entered for the plaintiff in the sum of $100, that being the penal sum of the bond, and that execution issue for the sum of $79.41. Judgment was entered, and both defendants appealed.

The case was submitted on briefs.

H. Lougee & J. G. Robinson, for the defendants.

S. Parsons & H. A. Bowen, for the plaintiff.

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SHELDON, J. 1. The defendant Robinson's motion to dismiss was rightly overruled. It does not appear by the record that any judgment was entered in his favor in the First District Court of Eastern Middlesex. The certificate of the proceedings in that court filed in the Superior Court on the defendants' appeal, in conformity with the provisions of R. L. c. 173, § 102, shows merely that his answer in abatement was sustained on December 17, 1904, and that on December 23 next following, the plaintiff's motion to stay judgment thereon was filed and allowed, and the case was continued accordingly without the entry of any judgment in favor of the defendant Robinson. The mere fact that the motion filed by the plaintiff refers to such a judgment as having been entered on December 23, 1904, cannot control a record which shows that no such judgment was entered.

2. Nor could the defendants' demurrers have been sustained.

If we assume, as argued by the defendants, that the plaintiff's second declaration never was allowed by the court as an amendment to the declaration originally filed, yet none of the causes of demurrer relied on can be said to be fatal.

A copy of the bond declared on was annexed to the original declaration. The averments of the declaration, taken in connection with the recitals of the bond, were *prima facie* sufficient. It cannot be said that more particular averments descriptive of the original judgment were necessary. Its recovery was one of the matters of inducement recited in the bond. The averment that the defendant Waters failed to prosecute his writ of review to final judgment sufficiently avers a material breach of the condition of the bond; and it cannot be said as matter of law that it was necessary to describe fully the writ of review and set out all the proceedings that were had thereon. And it was not necessary to declare that any execution had issued, or that any demand had been made upon the defendant Waters; so that a lack of particularity in these averments was not material.

It may be that the declaration does not sufficiently aver in terms that the defendant Waters had not satisfied the final judgment against him; but the defendants did not take this point and have not argued it. Whether an execution issued upon the judgment was satisfied was material only as evidence to show whether there had been a satisfaction of the final judgment.

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Had this point been properly taken upon a demurrer, the plaintiff might have been allowed to amend his declaration.

The judgment of the Superior Court must be affirmed; and it is

So ordered.

THOMAS KELLY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 8, 1908. — February 27, 1908.

Present: KNOWLTON, C. J., LORING, SHELDON, & RUGG, JJ.

Negligence, Street Railway, In use of highway. *Custom.*

At the trial of an action of tort against a street railway company to recover for injuries received by the plaintiff from being run into by a street car of the defendant, it appeared that the plaintiff, when run into, was at work in the street where the car ran and was in the employ of a contractor who was placing crushed stone on the surface of the street from the curbing of the sidewalk to within eighteen inches of the car track, that the car of the defendant did not overhang the street from the track eighteen inches, that cars approaching could be seen for over two hundred feet from the place where the plaintiff was standing, that the plaintiff neither saw nor heard the car before it struck him and was not thinking at all whether he was so near the track that a car might hit him, that, when struck, he was facing in a direction away from the car but could not tell whether he was walking toward the track or away from it, and that the accident happened at about noon on a bright summer day. The plaintiff testified that he had noticed "it was customary for cars to ring their gongs when men were near the track, but that for hours at a time he would not notice whether the cars rang their gongs or not, but that when he did notice, they did so when men were near the track." *Held*, that there was no evidence that the plaintiff was in the exercise of due care; and *also*, that the evidence fell far short of indicating any established custom on the part of the employees of the defendant as to the ringing of gongs, and of showing any excuse for the failure of the plaintiff to use his own senses for his protection.

TORT for personal injuries received by the plaintiff from being run into by an electric street car of the defendant while he was working in a street. Writ in the Superior Court for the county of Suffolk dated October 13, 1903.

At the trial, which was before *Richardson*, J., besides the facts stated in the opinion, it appeared that the accident happened shortly after noon on a clear day in July on the southerly side of Massachusetts Avenue at its junction with St. Botolph Street. Other facts are stated in the opinion.

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At the close of the evidence, the defendant requested the presiding judge to rule (1) that on the whole evidence the plaintiff was not entitled to recover; (2) that there was no sufficient affirmative evidence of the plaintiff's due care; (3) that there was no sufficient evidence of any universal custom to sound a gong; and (4) that there was no evidence of any custom to sound a gong sufficient to entitle the plaintiff to rely thereupon. The requests were refused, there was a verdict for the plaintiff, and the defendant alleged exceptions.

F. Ranney, for the defendant.

M. A. Sullivan, for the plaintiff.

SHELDON, J. The only question that need be considered in this case is whether there was any evidence that the plaintiff was in the exercise of due care at the time of the injury. He was laying crushed stone on the surface of Massachusetts Avenue between the curbstone and a line of paving stones which projected a distance of eighteen inches outside of the defendant's tracks. His work did not bring him between those tracks, or within eighteen inches of them. There was affirmative evidence that the overhang of the defendant's cars was not beyond that distance, and no claim was made to the contrary. Cars frequently passed; the track was straight and the view was unobstructed for over two hundred feet. The plaintiff was facing in the opposite direction from that in which the cars came; he neither saw nor heard the car before it struck him; he did not know whether he was standing still or moving just before it struck him, though he thought that he was moving but could not say whether towards the track or away from it. He testified also that at the time of the accident he could stand where he pleased as he worked; that he was not thinking at all whether he was so near the track that a car might hit him; that he did not have that in his mind at all.

If this were all the evidence, it would be impossible to avoid the conclusion that the plaintiff was taking no care whatever or acting with any regard to his own safety, but was relying wholly upon the defendant to look out for him. The case would be like *Gorham* v. *Milford, Attleborough & Woonsocket Street Railway*, 189 Mass. 275, and *Quinn* v. *Boston Elevated Railway*, 188 Mass. 473. There was no evidence of such pre-

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cautions as were testified to in *O'Leary* v. *Haverhill & Plaistow Street Railway*, 193 Mass. 339.

But the plaintiff testified also "that he had worked in that locality for some weeks, and that he had noticed it was customary for cars to ring their gongs when men were near the track, but that for hours at a time he would not notice whether the cars rang their gongs or not, but that when he did notice, the cars rang their gongs when men were near the track." And it is claimed that the jury might find that he had a right to rely upon this practice and to expect to be warned by the gong of an approaching car, if he was in dangerous proximity to the track. But this evidence falls far short of indicating any established custom, or of showing any excuse for a failure to use his own senses for his protection. There was similar evidence of a failure to ring the gong in *Quinn* v. *Boston Elevated Railway*, *ubi supra*. There was nothing to prevent the plaintiff, while doing his work, either from standing where a car could not have hit him or from taking such a position as to see readily when a car was approaching. Due care required that he should not leave all concern for his safety to the defendant. He was not at work on the defendant's premises under an implied assurance of safety, as in *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379; nor was there any evidence of a duty or an established custom for the defendant or its superintendent to give notice of the approach of a car, as in *Meadowcroft* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 249, and cases there cited; nor had he a right to expect a warning from his own foreman, as in *Ahearn* v. *Boston Elevated Railway*, 194 Mass. 350.

Although there was evidence of negligence on the part of the defendant, yet, by reason of the plaintiff's failure to exercise proper care, the defendant's request for a ruling that the plaintiff was not entitled to recover should have been granted.

Exceptions sustained.

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BAR ASSOCIATION OF THE CITY OF BOSTON *vs.* WILLIAM P. HALE.

Suffolk. January 8, 1908. — February 27, 1908.

Present: KNOWLTON, C. J., LORING, SHELDON, & RUGG, JJ.

Attorney at Law, Disbarment. *Words*, "Misconduct."

A material question at the hearing on a petition for the disbarment of an attorney at law was whether a charge of $3,600 made by the attorney to a client for services was proper. The respondent was employed by the client, a married woman, to obtain for her either separate maintenance or a divorce from her husband, and had paid nothing to the respondent as a retainer or on account of disbursements to be made, although she gave him security worth $250. The respondent testified that he spent one hundred and fifty-four days of six hours each on the case during a period of two years, and that finally by the use of detectives he procured evidence of adultery on the part of the client's husband and other evidence by the use of which he was able to compel the father of the client's husband, the husband being without financial resources, to pay to the client $7,700 and to undertake to maintain and educate the client's two minor children, and also was able to procure a divorce without a contest. He further testified that the case was unusually difficult because of habits of drinking and of resorting to questionable places on the part of the client, and it appeared in evidence that, when complaint was made to a committee of the bar association by the client, the respondent, in order to prevent proceedings, threatened that he would make public certain misconduct (meaning sexual immorality) of hers. The client testified that she did not drink to excess and that she was not guilty of misconduct. Witnesses, qualified as experts, testified that in their opinion the charge of the respondent for his services as stated by him was reasonable. The presiding judge found that the charge was unreasonable and excessive. *Held*, that the presiding judge was not bound to believe the evidence produced by the respondent, and that the finding would not be disturbed.

A finding by the judge presiding at the hearing of a petition for the disbarment of an attorney at law, that a promissory note given by a woman client to the respondent, while the confidential relation of attorney and client still existed, in payment of his charge for services already rendered by him, was not procured by the respondent with the fraudulent intent of obtaining money from her under the pretence that it was due to him for services, does not preclude the presiding judge from finding that the charge for services was unreasonable and excessive and that the respondent was guilty of unprofessional conduct in making it.

Where evidence introduced at the hearing of a petition for the disbarment of an attorney at law tends to show that, after a complaint to the grievance committee of a bar association by a woman who was a client of the attorney and had been charged an excessive and unreasonable fee for services by him, the attorney had interviewed the secretary of the committee and then had written to the client that, if she did not retract her statement that he had procured

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from her a note for the amount of the services by fraud, he would "make a statement of the increased difficulties I had in handling your affairs owing to your own misconduct," and that he also had made a similar statement to the secretary as to the client's "misconduct," but that the client had been guilty of no misconduct and that the attorney had no evidence of any, findings by the presiding judge that by "misconduct," the attorney meant "sexual immorality," and that the attorney was guilty of unprofessional conduct in making the threat were warranted.

PETITION for disbarment filed in the Superior Court for the county of Suffolk January 11, 1907.

After the petition was filed, Arthur D. Hill, a member of the bar, was authorized by the presiding judge to prosecute the inquiry and proceedings in relation to it.

The specific allegations of the petition with regard to misconduct on the part of the respondent were as follows:

"3. In or about the year 1904, at some time not precisely known to your petitioner, one Gertrude S. Brackett, wife of one Arthur L. Brackett, employed the respondent to represent her as an attorney at law in divorce proceedings which she was then contemplating taking against her said husband.

"4. On or about April 12, 1906, a libel for divorce was filed in the Superior Court for the county of Suffolk by said Gertrude S. Brackett. The said libel was not contested and, after hearing by the court, a decree *nisi* was entered therein on or about May 18, 1906, which decree became absolute on or about November 18, 1906. The respondent appeared as attorney at law for the libellant in the said proceedings, including the hearing therein. Your petitioner is informed and believes that certain facts, which, if known to the court, would have prevented the granting of a divorce to the said Gertrude S. Brackett, were known to the respondent at the time of and prior to the hearing on the said libel, and that the respondent, contrary to his duty as an attorney at law, neglected to inform the court of such facts and concealed their existence from the court, thereby practising a fraud upon the court and obtaining for the said Gertrude S. Brackett a decree of divorce to which she was not legally entitled

"5. On or about April 18, 1906, immediately after the filing of the libel in the said divorce proceedings, a written agreement was made between the said Arthur L. Brackett, one Walter M.

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Brackett, his father, and the said Gertrude S. Brackett. . . . On the same day the sum of $1,700 was paid to the said Gertrude S. Brackett by the said Walter M. Brackett or by some other member of the family of the said Arthur L. Brackett on account of alimony. From this sum the said Gertrude S. Brackett then paid $1,000 to the respondent on account of services and expenses. On or about the same date, the respondent procured and persuaded the said Gertrude S. Brackett to sign two other papers, one a promissory note for $3,100, payable to the respondent with interest at four per cent; the other an assignment of the $6,000, referred to in the said agreement, as security for the payment of the said promissory note. The said Gertrude S. Brackett was a woman unfamiliar with business and inexperienced in the conduct of business affairs, and the respondent did not properly explain to her the nature and the legal force and effect of the papers signed by her and wilfully left her in ignorance of what she had done. Your petitioner is informed and believes that in so doing the respondent acted with the fraudulent intent of obtaining money from her under the pretence that the same was due him for services and expenses in the said cause.

"6. Subsequently the respondent, in pursuance of the fraudulent intent stated in the last section of this complaint, collected and received the said $6,000 and interest thereon, which, together with the said sum amounted to $6,142, by means of the said note and assignment, and procured and applied the sum of $3,174.36 from the same to the payment of the said note and the assignment under the pretence that same was due him for professional services and expenses in the said divorce proceedings, whereas, in truth and in fact, no sum was then so due him, or, if any sum was so due, it was much less than the amount which he so applied from the moneys so collected and secured by him.

"7. In or about the month of November, 1906, the said Gertrude S. Brackett made complaint of the conduct of the respondent to Charles E. Shattuck, Esq., then the secretary of the grievance committee of your petitioner, of which complaint the respondent then or shortly afterward had notice. The respondent, in order to prevent the said Gertrude S. Brackett from taking any further proceedings against him before the

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grievance committee of your petitioner, caused or attempted to cause the said Gertrude S. Brackett to be notified that if she proceeded farther with her complaint against him before the grievance committee and unless she abandoned the same, that he would cause certain alleged misconduct of her, the said Gertrude S. Brackett, to be made public and would thereby injure her character and reputation in the opinion of persons known to her."

There was a hearing upon the petition before *Fessenden*, J. The following facts were undisputed: In the fall of 1904 Gertrude S. Brackett, wife of Arthur L. Brackett, asked Herbert T. Lane, Esquire, if he knew the respondent, and he said that he knew him and that he knew nothing whatever against him. She therefore consulted the respondent and employed him to procure for her either separate maintenance or a divorce from her husband. It was necessary to employ several detectives to watch Brackett, and it was not until March 23, 1906, that evidence was discovered upon which a divorce libel was brought, adultery being alleged. Brackett was a man of no means, but his father had property, and, by contending that the father had alienated Brackett's affections from his wife, the respondent induced the father and Brackett to sign an agreement on April 13, 1906, by the terms of which $1,700 was paid forthwith to the respondent for his client, provision was made as to the custody and maintenance of two children, and it was agreed that some furniture should be delivered to her and that $6,000 should be deposited in a bank in Manchester, New Hampshire, of which the respondent's brother was vice-president, to be paid to Mrs. Brackett upon her procuring a decree absolute of divorce. This agreement was signed in the office of the attorney of Brackett and his father, and immediately thereafter Mrs. Brackett had an interview with the respondent in his office at which she signed a note payable to his order for $3,100, and an assignment of the sum in the bank as security for the note, and paid him out of the $1,700 just received by him $1,000 on account of services and to cover disbursements amounting to $500 made by him in her behalf. (The testimony with regard to this interview will be given in more detail below.) A decree absolute of divorce was granted to Mrs. Brackett on November 19, 1906. On the

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following day the respondent wrote to her: "Your divorce became absolute yesterday and the deposit of $6,000 was sent me with interest, $6,142.00, and I am ready to turn over the balance to you after satisfying my note, or to retain your part as an investment for you if you wish."

On November 23, Mrs. Brackett made to Charles E. Shattuck, Esquire, secretary of the grievance committee of the petitioner, a complaint against the respondent. Mr. Shattuck communicated with the respondent on November 24, which was Saturday, and on that same day the respondent went to the office of Mr. Lane and had an interview with him. The respondent's testimony with regard to that interview was as follows: "I went to Mr. Lane's office and went into his private office and said to him, 'Mr. Lane, as a friend of Mrs. Brackett I want you to take a messege to her from me.' He said, 'I am not a friend of Mrs. Brackett; my wife is a friend of Mrs. Brackett.' I said, 'Well, possibly you know of a complaint that she has made to the Bar Association of me.' He said he did not. He asked me what I had charged Mrs. Brackett and what she got out of her case. I told him that I could not tell him that. I then said, 'I have come here to ask you just one thing. I want you to say to her that, if she insists upon her complaint, statements will have to be made which will embarrass her and her friends,' and he said 'What statements? Statements reflecting upon her character?' and I said, 'Yes.' He said, 'What friends?' I said, 'I cannot state that to you, sir.' He said, 'Why not? On account of her privilege?' I said, 'There are other excellent reasons why I cannot state that to you and I have come to you.' He said, 'How can you prove this?' He asked if I had any writings or letters or anything. I said, 'I have a letter which would substantiate much of what I might say, perhaps.' He then asked me again if I would state to him what the facts were, and I told him it was impossible for me to do so. He said he doubted whether he could take that message because he was not a friend of hers himself, and it might be a little embarrassing. I said, 'Very well, she will understand it if you care to take it and I do it for her benefit.'"

On the following Monday, November 26, the respondent wrote to Mrs. Brackett: "I have delayed sending you cheque for the

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balance of $6,142.00 in my hands pursuant to our settlement only because I thought you might wish to leave the money in my hands for investment as you thought likely last spring.

"Your complaint to the Bar Ass'n, (made known to me Sat. 24th. Nov.) affords no reason why I should delay sending this balance $2,967.64 stated below.

"I requested Mr. Lane Saturday, to inform you that if you do not retract your false statement to Mr. Shattuck to the effect substantially that I obtained your note and assignment by fraud I shall make statement of the increased difficulties I had in handling your affairs owing to your own misconduct so frequently the subject of consultation as you know. I hesitated to do so Saturday because I do not desire to embarrass others; but if you do not correct your false charges, I shall not leave Mr. Shattuck in any doubt as to you nor without explanation of the size of my fee."

The statement accompanying the letter was as follows:

"Deposit $6000 with int.			. $6142.
Note April 13th, '06		$3100.00	
Int. same to Nov. 19th			
	4%	74.36	
Cheque herewith,		2967.64	
		6142.00	$6142.00"

On the same day the respondent wrote to Mr. Shattuck a letter containing the statement that he had sent Mrs. Brackett the balance of $2,967.64, and had written her "that if she does not retract her false charges as to the note and assignment I shall state the increased difficulty I had in the matter owing to her own misconduct, not leaving you in doubt as to her nor without explanation of the size of my fee."

There was a hearing before the grievance committee of the petitioner on the complaint made by Mrs. Brackett, as to which hearing Mr. Shattuck testified in substance: The respondent was asked whether the misconduct mentioned in the foregoing letter to the secretary of the committee was of a kind which would be material in the divorce suit, and he said, after a pause, undoubtedly it was. He then was asked, "Did you tell this to the court or disclose it to the court?" and he said "No." He then was asked

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why he didn't, and he said that he saw no reason for doing so, and he made further statements to the effect that he had never practised law with the idea that it was necessary to disclose in an uncontested suit such things, and had never understood from other lawyers that there was any such obligation. A little later he was asked this question: "Did you understand when the matter came before the court that Mrs. Brackett was or was not entitled to a divorce?" and he said, "I think I ought not to answer that question now, and perhaps never." It was stated to him by a member of the committee that, as his client had made a complaint against him, his privilege would be waived, and that the committee would hear what he had to say about it, and he said he would like to consult counsel. The committee said "Very well. Let us know if after consulting counsel you desire to make any further statement."

On December 21 the respondent wrote to the grievance committee a letter containing the following: "In explaining at the hearing December 17 what was characterized as my change of mind in refusing to make the statement of facts as to Mrs. Brackett as suggested in my letters to her and to your secretary, I said that the written complaint differed essentially from the complaint as I understood it from the oral statement of your secretary, that the time for such statement had not yet come, and that I should make it only as a last resort, because I did not wish to embarrass Mrs. Brackett and other parties, one of whom was a member of the bar and entirely innocent. I adhere to that determination. . . . If your committee has been told that I knew of facts which I was required to state to the court, I am entitled to know it before you proceed further. When such statement is made, I shall be ready to meet it, whatever it may be, and to make such further answer to your inquiries above referred to as may be necessary or proper."

The respondent, in his testimony with regard to his statements at the hearing before the grievance committee, agreed with Mr. Shattuck in every particular except that, when asked if he recalled being asked by the committee "Did you understand, when the matter came before the court, that she was or was not entitled to the divorce?" he replied, "I don't recall that; what is the answer?" He then being told that Mr. Shattuck had

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stated that his answer was "I think I ought not to answer that question now, and perhaps never," said "I don't recall that question. I don't recall. I did not hear Mr. Shattuck's testimony about that. Really, I did not hear that this morning [at the trial] and I don't now. I really don't recall that question, and I don't recall that answer now. I am rather surprised at it. To the best of my recollection I did not testify that way before the committee. I think if I made such answer as that, I must have misunderstood the question." He then was asked "When this case came before the court, the divorce court, did you understand that Mrs. Brackett was or was not entitled to a divorce," and replied "I understood she was entitled to a divorce, and believe so now." "Then you did not understand that there was anything in her conduct of any kind which would disentitle her to a divorce?" "Certainly not." "And if you had understood that such was the case, you would have felt called upon to call it to the attention of the court?" "I would not. I would not act for the woman; I should refuse to make any statement to the court."

It was agreed that the respondent suffered from deafness at the time of the trial and also of the hearing before the grievance committee to such an extent as to make it difficult for him to hear the testimony of other witnesses and the questions of attorneys.

The testimony of Mrs. Brackett with regard to the extent of the services rendered her by the respondent and the amount to be paid him therefor was that, from October 20, 1904, until the following July, she probably saw the respondent at his office once a week on the average, and from the fall of 1905 until March 23, 1906, she saw him probably twice a week, that various detectives were employed to watch Brackett, who was hard to watch because, being an artist with no studio, he had no regular habits. After March 23, 1906, she saw the respondent every day until the settlement on April 13. When she first went to the respondent she had some talk with him about his charges, but there was no definite arrangement made. Subsequently, when the question of settlement came up, the respondent told her that if the case was settled on the basis of a settlement of $5,000, he should claim $1,000 of it and his expenses. She

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then remarked that she thought that was quite exorbitant, and he said that it was usual when a case was taken in the way that was. Afterwards he said that he should claim just one half.

The testimony of the respondent with regard to the extent of his services and the amount to be paid him therefor was that Mrs. Brackett came to him in the middle of August, 1904, that he kept track of the amount of time he gave to her case; that he spent on it in all one hundred and fifty-four days of six hours each, that he had one hundred and twenty-five or one hundred and fifty interviews with her, most of them lengthy, and a still greater number with detectives and other persons who were working on the case, from whom he had between five hundred and six hundred pages of written reports; that the first time that he had any talk with Mrs. Brackett regarding his charge was on the day before the settlement was made, when he drew up a paper showing that his charge was to be $3,600, and handed it to her, stating: "I will take such portion of this $1,700 [which had just been paid him by Brackett's counsel] as you feel you care to let me have. I certainly must have my expenses and something over, and I will draw a note for the balance. I will draw an assignment of the bank account as collateral to the note," and that she said, "Very well." He further testified: "She said as to the amount of the charge, I understood (if I heard it correctly) that she only said it was rather large. She thought it was rather large. I do not recall that phrase. I do recall that she said this. She asked if I could not let her have $400 more, making an even $4,000 instead of $3,600 which she would get. I said to her, 'It seems to me I have made a reasonable charge here. I took all the responsibility. You have had an income of $250 a year out of your trust fund, and yet you have not turned any of it over to me. If I hadn't secured this result, I would have got no compensation that would have been at all adequate, and it seems to me that you ought not in fairness to ask me to take less than I think is fair and reasonable.' She said she was satisfied with that sum, and from that day to the present time has never made any complaint of any sort or kind to me."

It was undisputed that Mrs. Brackett paid nothing to the respondent on account of expenses or otherwise before April 13,

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1906, but that she deposited with him as security on October 20, 1904, jewelry worth $250. The disbursements made by the respondent were more than $500.

Mrs. Brackett's testimony with regard to the interview with the respondent on April 13, when she signed the note for $3,100 and the assignment of the money in the bank to secure it, was that, after an interview of half an hour in the office of Brackett's counsel, when the settlement agreement was signed, the respondent asked her to step into his office, saying he had a little business to transact, that she objected, saying that she was very tired, and not able to transact any more business that night, that he said he would like to see her, and so she went into his office; that he presented the papers for her to sign. "I asked him to be excused from signing them that night, as I was very tired, and did not fully understand them; thought I would like to have an opportunity of examining them before I did sign. He replied that he would like me to sign those papers that night, as it was better business; more legal to have all papers of even date in the case. I exclaimed a little on the size of the fee, said I thought it was rather large. I don't remember that I said anything more. Mr. Hale claimed that it was a perfectly just charge on account of the difficulties of the case."

Besides his testimony hereinbefore stated as to his interview with Mrs. Brackett on April 12, the respondent testified that on April 13 she did not state to him that she was tired but appeared entirely calm and showed no excitement.

The respondent testified that the "misconduct" on the part of Mrs. Brackett that he referred to in his letters to her and to Mr. Shattuck were her habits of drinking intoxicating liquors and "frequenting or visiting questionable places," stating that she had mentioned Winter Place Hotel and Tomfohrde's restaurant, that he certainly never had seen her the "worse for liquor" but once, and he hardly could say she was intoxicated then; that the reason that he had asked Mr. Lane to deliver the message to Mrs. Brackett that he did, was because he did not want the names of other persons, among them Mrs. Lane, to be brought out at the hearing, as they would have to be in order for him fully to explain the reason why his charge for ser-

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vices was so large as it was, namely, because the fact that he had to keep urging Mrs. Brackett not to drink and resort to questionable places, and to guard against her doing so, made his conduct of her case much more difficult.

Mrs. Brackett denied that she ever had told the respondent that she had been to the Winter Place Hotel or to Tomfohrde's restaurant with Mrs. Lane, and testified that she had no "special habits" with regard to the use of liquor, and never had been intoxicated.

At the close of the evidence, the respondent requested the presiding judge to rule as follows:

"1. Upon all the evidence in the case as a matter of law the petition cannot be maintained and should be dismissed.

"2. An attorney is not guilty of unprofessional conduct, who notifies his client, after disbarment proceedings instituted at her request, that if she does not retract her charges he will be compelled to make a statement of misconduct on her part which would be injurious to her and to other persons.

"3. There is no evidence in the case to warrant a finding that the respondent caused, or attempted to cause, Mrs. Gertrude S. Brackett to be notified that, if she proceeded with her complaint against him before the grievance committee, he would cause certain alleged misconduct on her part to be made public and would thereby injure her character and reputation in the opinion of persons known to her.

"4. There is no evidence in the case to warrant the finding that the respondent's charges for his services and disbursements were excessive or unreasonable.

"5. A libellant may be guilty of misconduct, which is not sufficient to be a cause for, or a bar to a divorce, but may be material on the issues of separate maintenance, alimony, or the custody of minor children, provided those issues are heard and tried by the court."

The presiding judge refused the rulings requested and made a finding of fact as follows:

"The court finds as to the charge set forth in paragraph four of the petition that the respondent did not know of the facts set forth in said paragraph and was guilty of no concealment and did not practise any fraud upon the court in the divorce proceedings.

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"Upon the charge contained in paragraph five, the court finds that the respondent did not commit the acts therein stated, and did not act with the fraudulent intent therein set forth.

"As to the charge contained in paragraph six, the court finds that the sum which the respondent charged and retained from the amount received by him was excessive and unreasonable.

"As to the charge contained in paragraph seven, the court finds that, after Gertrude S. Brackett therein named had made her complaint to the secretary of the grievance committee of the petitioner, and after the respondent had had notice of such complaint, he, in order to prevent the said Gertrude from further proceedings against him before the grievance committee, caused her to be informed that, if she proceeded further with her complaint against him before the grievance committee, and unless she abandoned the same, he would cause certain misconduct of hers (meaning sexual immorality) to be made public, and would thereby injure her character and reputation in the opinion of persons known to her, and that he stated to the said grievance committee that he was in possession of evidence of misconduct on her part which was material to the divorce proceedings stated in the petition in this suit, intending to have the said committee understand that she had been guilty of sexual immoralities.

"In fact, he had no such evidence, and the court finds on the evidence before it that there was no such misconduct."

The presiding judge therefore ordered that the respondent be suspended from the office of attorney at law in the courts of this Commonwealth for the term of one year; and the respondent alleged exceptions.

Other facts are stated in the opinion.

W. R. Bigelow, (*W. P. Hale* with him,) for the respondent.

A. D. Hill, for the petitioner.

SHELDON, J. At the hearing of this petition for the disbarment of the respondent, the judge found in his favor upon the charge contained in the fourth paragraph of the petition; and this part of the case is now settled in his favor.

The judge found that the respondent did not commit the acts stated in the fifth paragraph, and did not act with the fraudulent intent therein set forth, but that the sum which he charged and retained from the amount received by him as charged in the

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sixth paragraph was excessive and unreasonable. The respondent now contends as to this that there was no evidence in the case to warrant the finding that his charges were excessive or unreasonable, and therefore that his fourth request for rulings should have been given. He also argues that it is now settled by the finding of the judge that the note which Mrs. Brackett gave to him was not obtained by fraud or with fraudulent intent to obtain money to which he was not entitled, and that the validity of that note is established by this finding. These claims may be considered separately.

On a careful review of the testimony, we cannot doubt that there was evidence to warrant the finding that the sum charged by the respondent was excessive and unreasonable. There was evidence that he was employed to obtain for Mrs. Brackett a divorce from her husband, and that he undertook to do so; that the chief difficulty in this lay in the lack of evidence to prove the adultery which it was suspected had been and was being committed; that to obtain this evidence the respondent employed detectives to watch the husband, and that they succeeded, after about a year and a half, in securing evidence of adultery; that he then, by claiming that the father of his client's husband was liable to her for procuring the alienation from her of her husband's affections, brought about a settlement with both her husband and his father, by which he secured for her the sum of $7,700 besides certain articles of household furniture and a provision for the support and education of her minor children. He also obtained the divorce which she desired. There was no doubt that her husband was a man of no property, and that she probably could not have collected alimony or expenses from him. It was agreed that the respondent's disbursements were properly reckoned at $500. For his services he charged the sum of $3,600, being one half part of the net amount of money received by him for her.

There was no doubt testimony on which it might have been found that this charge was not excessive or unreasonable. It was nearly two years from the time of the respondent's employment until the decree of divorce was obtained, and more than two years before that decree was made absolute and the final payment of $6,000 secured. According to the respond-

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ent's testimony, much of his time, more than one hundred and fifty full days reckoned at six hours each, had been spent in working upon the matters involved and in interviews with his client and the detectives employed; many clues had been investigated and much labor performed which had not yielded the hoped for results. The prospect of obtaining a proper compensation for services and a reimbursement of money expended depended largely upon the result reached. And attorneys, properly qualified as experts, testified that under the circumstances claimed by the respondent his charges were reasonable, "viewed either from the standpoint of the results obtained or from the standpoint of *per diem* charges." If the respondent's testimony as to all these circumstances of the case were followed, a finding in his favor upon this point might well have been expected.

But right here is the infirmity of the respondent's position. The judge was not bound to accept his version of the circumstances. He might have found that, acting with due fidelity to his client's interests, the respondent was not justified in protracting his conferences with the client to such an extent as to consume the time to which he testified. The only litigation actually engaged in was the libel for divorce, and that was uncontested. The demand for alienation of affections never was actually put in suit. The judge well might find, as he did find, that the respondent's claim that peculiar difficulties in prosecuting the libel for divorce were caused to him by reason of misconduct on her part was wholly without foundation. His conduct before the committee of the Bar Association and what might have been found to be his efforts to stifle the inquiries which resulted in the bringing of this petition might be found to indicate that he wished to avoid investigation of the charge because he did not himself regard it as a fair and reasonable one. It is too plain for discussion that the judge might find a charge of $3,600 for procuring the discovery of evidence of adultery, bringing a libel and obtaining an uncontested decree of divorce, and settling an unlitigated claim for the alienation of the affections of a husband for what was obtained in this case, to be excessive and unreasonable, unless it was justified either by unusual ability and skill in the respondent or by the fact

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that an unusual amount of labor and responsibility was called for and actually used. Upon these questions we cannot review the findings of the judge who tried the case.

But the respondent contends that the validity of the note which he took from his client has been established by the finding that it was not obtained by fraud or with any fraudulent intent on his part. He claims that he cannot be punished for unprofessional conduct on the ground that his charges were excessive and unreasonable when those charges have been found to be a matter of contract entered into without fraud. He cites the language used by this court in *Boston Bar Association* v. *Casey*, 196 Mass. 100: "We do not mean to intimate by anything that we have said that Bruce could not legally have agreed with the respondent that he could have the $800 for such services as he might render, however much in excess that sum would be of a reasonable compensation for what was done." Undoubtedly an agreement fairly made between attorney and client, before that relation is entered into, as to the compensation to be received by the former for the services which it is expected that he will render, is *prima facie* valid and binds the parties to it. It was of such a supposititious agreement that the language above quoted from *Boston Bar Association* v. *Casey*, 196 Mass. 100, was used. But this agreement was made and the note and assignment were executed long after the confidential relation of attorney and client had been created between these parties, while it was still in full existence, before the decree for a divorce had been obtained, and before the absolute right to $6,000 of the money to be realized had accrued. It was one of those agreements between attorney and client which the law views with jealousy, and will enforce only to the extent of reasonable compensation for the services actually rendered. See the cases cited in 4 Cyc. 961 *et seq.*; 987 *et seq.* The respondent did not put himself at arm's length from his client before carrying out this transaction with her; he did not see that she had independent advice, or secure her time to consider this important matter: on the contrary it might have been found that he hastened to complete the transaction against her objection when, by reason of fatigue and excitement, she did not fully comprehend the nature of the act. *Hill* v. *Hall*, 191 Mass. 253. Even though he acted

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without any specific fraudulent intent, it cannot be said that this was so fair and free a bargain between parties who stood upon an equal footing that the court could not inquire and determine whether the amount charged was excessive and unreasonable.

Accordingly we are of opinion that this finding of the judge was warranted by the evidence, and that the respondent's fourth request was refused rightly.

The finding of the judge as to the matters charged in the seventh paragraph of the petition may be considered in connection with the respondent's second and third requests for instructions. Substantially this finding was that the respondent attempted to prevent Mrs. Brackett from proceeding against him by the threat that if she did so he would cause certain misconduct of hers to be made public and would thereby injure her character and reputation; and it was found by the judge that the respondent used the word "misconduct" in the sense of sexual immorality, and that in fact there had been no such misconduct on her part and he had no evidence of it, although he stated to the committee of the Bar Association that he was in possession of such evidence. The respondent contends that this finding was unwarranted by the evidence.

We have read over carefully the evidence upon this issue and are satisfied that it fully warranted the finding made. The judge was not bound to accept the explanation made by the respondent of his conduct in this matter. Without that explanation, there was abundant evidence that his object in what he did was to stifle the investigation of the charges against him by playing upon the natural fears of a woman against whom unfounded charges of sexual immorality were threatened. What he said to the witness Lane and what he said and wrote to Mr. Shattuck and to the committee of the Bar Association tend to support this view. And it was for the judge to determine the sense in which the respondent used the word "misconduct" and in which he intended it to be understood. The word was used with reference to divorce proceedings, and on some occasions in speaking to lawyers; and one of the definitions of this word given in the Oxford English Dictionary is "improper conduct; wrong behavior; now often in judicial spec. in the sense of adultery." And see 27 Cyc. 804. The real meaning intended

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to be conveyed by ambiguous words is a question of fact in actions for libel. *Riddell* v. *Thayer*, 127 Mass. 487. *Twombley* v. *Monroe*, 136 Mass. 464. The circumstances and connection in which the word was used by the respondent tend strongly to indicate that he intended to be understood as threatening to make a charge of sexual immorality and to support it by evidence in his possession, which in fact he did not have. His refusal before the committee of the Bar Association to answer the question whether he understood, when the matter came before the court, that Mrs. Brackett was or was not entitled to a divorce, taken in connection with some of his testimony at the trial of this petition, points in the same direction; and it was for the judge at the trial to determine the effect of his explanation of this. We have examined the cases as to the meaning of this word referred to by the respondent, and find nothing in them inconsistent with what has been said. They illustrate the wide range of meaning which the word may have according to the different connections in which it is used. *Baldwin* v. *Foster*, 138 Mass. 449, 453. *Van Cleaf* v. *Burns*, 118 N. Y. 549. *English* v. *English*, 4 Stew. 543. *Rea* v. *Rea*, 63 Mich. 257.

We conclude, therefore, that this finding of the judge was warranted, and that the respondent's third request was rightly refused.

His fifth request was not material, upon the findings of fact made by the court, and need not be considered.

Upon these findings, the respondent's first request could not have been granted; and the order for his suspension was warranted. It needs no argument and no citation of authority to support this proposition.

Exceptions overruled.

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ANNIE CASEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 14, 1908. — February 27, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Street Railway, In use of highway, Due care of plaintiff.

A girl nine years of age, in crossing a street in which there was a double line of street railway tracks, which she had been accustomed to cross at that point frequently every day for two years, saw a car standing on the track nearer her and a car rapidly approaching on the farther track, and, with an opportunity continually to see the car on the farther track and having it in mind, she attempted to cross in front of it after the car nearer her had moved on, thinking that she had time to get across, if she hurried, and meaning to run if she had to. She was run into and injured. Her parents often had told her not to take the risk that she did take. *Held*, that she could not be said to be in the exercise of any care.

TORT for personal injuries alleged to have been received by the plaintiff through being negligently run into by an electric street car of the defendant. Writ in the Superior Court for the county of Suffolk dated January 15, 1904.

At the trial, which was before *Stevens*, J., besides the facts which are stated in the opinion, it appeared that at the time of the accident the plaintiff was nine years of age, and that the accident happened on Washington Street, in that part of Boston which formerly was Brighton, nearly in front of the municipal court house. The plaintiff was attempting to cross the street, going toward the court house from the side of the street opposite, and was walking fast on her way to school, but was not hurrying, because she was not late. Her testimony in direct examination was: "I did n't step on the rail but I looked both ways; I looked toward Boston and then toward Oak Square; I saw the car coming from Boston, and the car that was going into Boston was standing still, and then it went on and I went behind it. The car that was coming from Boston was quite a distance away from me and I thought I had time enough to get across, so I went across and it struck me before I got across." In cross-examination she stated that she could see the car which struck her, the one going from Boston, before the one going toward Boston passed from in front of her, and that she saw it several times before she started upon its track, and that it was going

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rapidly, "but I still meant to walk across anyway, run if I had to. . . . I don't think there was anything that prevented my seeing the car that struck me from the time I got to the first rail up to the time that I was struck. Was in plain sight as I came near the track on which it was running. I could see it plainly coming toward me. I could see how fast it was going and I saw that it was going fast. I tried to get across in front of it — that is the way I got hurt. . . . I wanted to get across if I could and I took my chance of getting across in front of it. It did not slow up at all, as it came toward me. It kept coming along just as fast, I could see that. I had been across the street a great many times there, going to and from school, when the cars were coming. Sometimes I had run across in front of cars, not very many, and had calculated my chances whether I could get across ahead or not. I had tried that before and thought I could tell whether I had time enough or not. There was n't anything else that attracted my attention or anything else that I had to look at. I could give my whole attention to this car. . . . I was giving my whole attention to it. . . . I had been cautioned to look out for cars and cautioned not to run across in front of them. My father and mother had told me not to take chances like that, not to do the very thing I was doing that day."*

In redirect examination, she stated, "I wouldn't have gone on second track, where the Boston car was coming, if I hadn't thought I had an opportunity to get across safely."

Other facts are stated in the opinion.

At the close of the plaintiff's evidence, the defendant requested the presiding judge to rule "that the plaintiff was not entitled to a verdict in her favor." He declined to do so and, the parties agreeing that he assess the damages, he assessed them in the sum of $1,000, the jury returned a verdict for the plaintiff, and the case was reported for the determination of this court, it being agreed that, if the evidence was sufficient to warrant the

* The quoted passages from the cross-examination of the plaintiff are taken directly from the record, but it was agreed at the argument before this court that they were not in the language of the plaintiff but in that of leading questions by the defendant's counsel, to which the plaintiff replied "yes," or "no."

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jury as a matter of law in finding a verdict for the plaintiff, judgment should be entered for her for the sum of $1,000 and costs, otherwise judgment should be entered for the defendant.

C. F. Choate, Jr., for the defendant.

M. A. Sullivan, for the plaintiff.

SHELDON, J. There was evidence tending to show that the defendant's servants were guilty of negligence in the running of the car that struck the plaintiff, and the only question which need be considered is whether the plaintiff could have been found to be in the exercise of that degree of care which is properly to be expected from a child of her years. In this respect the case resembles *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562. The plaintiff knew that the car was approaching her; she thought that she had time enough to cross in front of it if she hurried, and made up her mind to do so. So she went, apparently with haste, past two men, the witnesses Young and Brogie, who had stopped for this car to pass, stepped upon the rails, and was immediately struck by the car. She had been going over this place four times a day for about two years, and had become well acquainted with it. There was some evidence that the gong of the car was not sounded; but this did not affect her conduct, for she had seen the car; she was not misled by the other car's passing in front of it; it was in plain sight to her, with nothing to prevent her seeing it as she came near to the track on which it was running; she could have stopped instantly if she had desired. The direct cause of the accident was that which she herself assigned in her testimony: "I tried to get across in front of it — that is the way I got hurt." As in *Madden* v. *Boston Elevated Railway*, 194 Mass. 491, she took her chance; and it does not help her that this was the very chance which her father and mother had often told her not to take. The case against her is the stronger because, as she also testified, she was not frightened, knew just how the car was coming, and just what the danger was if she got struck. It is impossible to say that she was exercising any care. *Holian* v. *Boston Elevated Railway*, 194 Mass. 74, and cases there cited.

In accordance with the terms of the report, judgment must be entered for the defendant.

So ordered.

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THEODORE R. CONVERSE, receiver, *vs.* JAMES B. AYER.

Suffolk. November 11, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Corporation, Foreign, Statutory liability of stockholder. *Conflict of Laws. Receiver. Judgment. Notice. Constitutional Law.*

In an action of contract by a receiver of a Minnesota corporation against a Massachusetts shareholder therein to recover an amount levied upon the defendant's shares as an assessment by a decree of a Minnesota court under a section of the State constitution of Minnesota which provided that "each shareholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him," it appeared that the court which decreed the assessment had appointed the plaintiff receiver and that it was a State court of general jurisdiction, that it had empowered the receiver to collect the assessment by proceedings in any court of any State or territory of the United States, that, by the statutes of Minnesota as they existed when the defendant became a shareholder, a receiver had no power to collect such an assessment, but subsequently, and before the decree above mentioned, a statute had been passed specifically authorizing a decree giving a receiver such power. The court of last resort in Minnesota, which had exclusive jurisdiction of the subject matter and of the corporation, on an appeal by certain shareholders other than the defendant from the decree levying the assessment and empowering the receiver to collect it, decided that the corporation was not a corporation organized for the purpose of carrying on any kind of manufacturing or mechanical business, and that the decree levying the assessment was valid. *Held*, that the questions, whether the corporation was or was not one whose shareholders by the terms of the constitutional provision were subject to the assessment, and whether the enlargement of the remedy against the shareholders by the statute enacted after they became such was within the power of the Legislature, being questions already finally determined by a Minnesota court having exclusive jurisdiction of the subject matter and of the corporation, could not be reinvestigated in the courts of this Commonwealth.

A Legislature may enlarge the remedy provided for the enforcement of an existing substantive right, or may provide a new remedy therefor, provided it neither enlarges nor diminishes the right itself.

A court of Minnesota which had jurisdiction of a corporation incorporated under the laws of that State, in a proceeding instituted under local statutory provisions by a creditor of the corporation, appointed a receiver thereof and later, in the same proceeding, in compliance with further local statutes and constitutional provisions, after a hearing levied an assessment upon the shareholders of the corporation for the purpose of paying the debts of the corporation and the expenses of the receivership and of the collection of the assessment, and authorized the receiver to proceed in any court, local or foreign, to enforce the collection of the assessment. The receiver brought an action in a court of this Commonwealth to enforce the assessment against a Massachusetts shareholder, who

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had had no notice or knowledge of the proceedings in the Minnesota courts, and the defendant contended that the decree levying the assessment was not valid as to him because he had neither notice nor knowledge thereof. *Held*, that, as the defendant was a shareholder, service upon the corporation in proceedings to marshal its property for the payment of its debts concluded him; *and* that, there being no allegation that the decrees of the Minnesota court were procured fraudulently, such decrees could not be reviewed in the action in this Commonwealth.

Where, in an action by a receiver of a Minnesota corporation appointed by a Minnesota court against a shareholder residing in a State other than Minnesota or Massachusetts to enforce an assessment authorized by the State constitution of Minnesota in accordance with a remedy provided by a statute which enlarged the remedy that existed when the defendant became a shareholder, the defendant contended that the statute under which the receiver proceeded was unconstitutional because, in violation of U. S. Const. art. 1, § 10, it changed to his detriment an obligation arising out of his contract as a shareholder, and, the question being carried to the Supreme Court of the United States, the defendant's contention was held to be unfounded, this court, in an action brought here by the same receiver to enforce against a Massachusetts shareholder the same decree of the Minnesota court, in which the defendant makes the same contention as to the unconstitutionality of the Minnesota statute, is bound by the decision of the Supreme Court of the United States on the constitutional question.

By proceedings, properly instituted in a Minnesota court by a Minnesota creditor against a Minnesota corporation, a receiver of the corporation's assets was appointed and, under the State constitution and enabling statutes, the court levied an assessment upon shareholders to pay the debts of the corporation and the expenses of the receivership and of the collecting of the assessment, which was less in amount than the maximum assessment possible under Minnesota law, and empowered the receiver to bring actions for its collection in any State where it was necessary so to do, and, on an appeal by shareholders to the highest court of resort in Minnesota, this decree was held to be valid. In an action against a shareholder in this Commonwealth, to collect the amount of the assessment upon the shares held by him, the defendant contended that the expenses of the receivership and of collecting the assessment from other shareholders should not be included in determining the amount of assessment to be levied on his shares. *Held*, that the adjudication of the Minnesota court was binding upon the courts of this Commonwealth in an action brought here by the receiver to enforce the assessment, at least so long as the assessment did not exceed the par value of the shares held by the defendant.

CONTRACT to enforce an alleged liability of the defendant as a shareholder of the Minnesota Thresher Manufacturing Company. Writ in the Superior Court of the county of Suffolk dated August 7, 1903.

There was a hearing before *Fox*, J., without a jury, upon an agreed statement of facts.

In 1874 a corporation was organized under the laws of Minnesota by the name of Seymour, Sabin and Company for the purpose

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of carrying on the business of general manufacturing, merchandising and lumber. It acquired and possessed at Stillwater, Washington County, Minnesota, a manufacturing establishment and plant, and manufactured and sold threshing machines and other farm and agricultural machinery and implements. In 1882 it sold all its property and plant to the Northwestern Manufacturing and Car Company, a corporation organized for the "manufacture, building, and sale of steam engines of all kinds, . . . of all kinds of cars, and the fixtures and attachments thereto belonging, . . . of farm implements and machinery of all kinds, and . . . of all articles, implements, and machinery of which wood and iron form the principal component parts, and the manufacture of the materials therein used," and which had preferred and common stock. This Northwestern Manufacturing and Car Company continued the manufacturing business at Stillwater, carrying on the same in the manner in which it had been carried on by its predecessor so far as it related to the manufacturing of threshing machines, agricultural machinery and implements, and added thereto the business of manufacturing cars. Subsequently it became embarrassed and unable to meet its obligations, and in 1884 a receiver was appointed by the District Court of Washington County in the State of Minnesota, who took possession of all its property. A meeting of the creditors of the corporation was held and a new corporation was organized under a statute of Minnesota entitled "An act relating to manufacturing corporations," and named Minnesota Thresher Manufacturing Company, the articles of association stating: "The objects for which this corporation is formed are the purchase of the capital stock, evidences of indebtedness issued by it and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used."

In the letter of the incorporators to the creditors of the North-

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western Manufacturing and Car Company, seeking that they subscribe for the stock of the new company in return for the debts owed them by the old, was the statement, "No individual liability attaches to a subscription, and the stock when issued will be full paid and non-assessable."

There were two classes of capital stock of the new corporation, preferred and common. The preferred stock was issued to creditors of the Northwestern Manufacturing and Car Company in return for a cancellation of their claims against that company, and the common stock was issued to holders of preferred stock of that company in return for their stock. The new corporation did nothing from the time of its organization until it purchased the assets of the Northwestern Manufacturing and Car Company, except to issue its stock according to the plan of reorganization and borrow certain sums of money for the necessary expenses of such organization and issue of stock. In 1888, after a sale by the receiver of the Northwestern Manufacturing and Car Company, all the assets of that corporation were conveyed to the new corporation, which thereupon began to transact business, and continued to do so until in December, 1900, when the Massachusetts Loan and Trust Company instituted in the United States Circuit Court for the District of Minnesota proceedings to foreclose a mortgage which it held upon the entire property of the corporation. A receiver was appointed, and, under proper proceedings, a sale was made by him of all the property of the corporation.

In 1901 the Merchants National Bank of Saint Paul, Minnesota, recovered a judgment against the Minnesota Thresher and Manufacturing Company in the District Court for Ramsey County, Minnesota, and, executions having been issued and returned unsatisfied by sheriffs of that and of Washington County, the bank in August, 1901, filed an action in the District Court of Washington County, a State court of record and of general jurisdiction, in which it set forth its judgment, the fact that the corporation had no property, the amount and classes of its outstanding capital stock, and averred that it and all the other creditors of the corporation were without remedy to secure their claims, except through the appointment of a receiver of the corporation who should have authority to sue for

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and enforce the liability of the shareholders of the corporation created by the constitution and laws of the State of Minnesota, and prayed for the appointment of such a receiver.

A citation was issued by the court summoning the corporation and requiring it to answer and to serve a copy of its answer upon the bank's attorneys within twenty days. On August 15, 1901, this citation was served upon E. D. Buffington, alleged by the officer who served it to be the secretary of the company. Buffington at once handed the summons to S. Blair McBeath, an attorney at law practising in the courts of the State of Minnesota, and requested him to appear for the corporation in the case.

On August 16, 1901, a decree was entered reciting that it appeared to the court that due notice was given by serving the same upon the defendant and upon S. Blair McBeath, its attorney, and "the parties hereto having duly appeared, . . . and the evidence having been taken . . . and the court having duly considered the matter," decreed that the property of the corporation be sequestrated and appointed Theodore R. Converse (the plaintiff in this action) receiver "with full authority to sue for, collect, recover, compromise, and settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by this court on account thereof for the satisfaction of the claims of the creditors of said defendant, and of the expenses of the administration of this trust, including the fees, allowances, and expenses of said receiver and his counsel, . . . either in the courts of the State of Minnesota or the courts of any other State or territory of the United States, . . . and, in general, to do and perform all acts that in the opinion of said receiver, or that he may be advised, are needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States or of the various States and territories of the United States."

Buffington, upon whom the citation above mentioned was served, was elected secretary and a director of the corporation at its annual meeting in 1892. That was the last annual meeting held before the citation was served. He did not notify

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any of the board of directors that the process had been served upon him or that the suit had been brought. The by-laws of the corporation provided for an election at each annual meeting of a secretary of the corporation, who should hold his office for one year or during the pleasure of the board of directors or until his successor was "duly elected and qualified." They also provided that the "government and management of the affairs of this corporation shall be vested in a board of directors."

Before the foreclosure proceedings instituted by the Massachusetts Loan and Trust Company, Buffington had also been chosen as the general manager of the corporation. There was no evidence of what his duties as such general manager were. In those proceedings he had employed Mr. McBeath, to whom also he handed the citation in the receivership proceedings instituted by the Merchants National Bank. Mr. McBeath had no other authority to represent the corporation.

Buffington was, beside being an officer, a creditor of the corporation in the sum of $65,725.50.

The defendant in this action had been a holder of preferred stock of the Northwestern Manufacturing and Car Company, and, as such, subscribed and became the owner of twenty-eight shares of the common stock of the Minnesota Thresher Manufacturing Company at its organization. This stock he held at the time of the institution of the receivership proceedings against the latter corporation and at the time of the commencement and trial of this action. He never was a resident of Minnesota and was not a party to and did not have any notice or knowledge in fact of the above described proceedings for a receiver or of the ordering of the assessment hereinafter described.

The following provision of the constitution of Minnesota, art. 10, § 3, was in force throughout all the proceedings herein described: "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him"; and the only method of enforcing such liability at the time when the defendant became a shareholder in the Minnesota Thresher Manufacturing Company and at all the times when the liabilities, to satisfy which the assessment upon the stockholders hereinafter de-

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scribed was made, arose, was under the sections of Gen. Sts. of Minnesota of 1894, c. 76, which are summarized in the opinion.

By a decision of the Supreme Court of Minnesota, rendered December 16, 1896, in the case of *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441, that court decided that, under the statutes as they then existed, the shareholder's liability provided by the constitution could not be enforced by a receiver appointed under the sections of Gen. Sts. 1894, c. 76, referred to, and stated in their opinion that it "must be enforced on the application of the creditors . . . except in cases where the statute otherwise provides."

On April 18, 1899, Gen. Laws, c. 272, was enacted by the Legislature of Minnesota. It was entitled an "Act to provide for the better enforcement of the liability of stockholders of corporations," and its provisions, so far as applicable to this case, were that, whenever a receiver for a Minnesota corporation was appointed by a District Court of the State, and he petitioned for a hearing upon the question of an assessment of the stockholders, the court, after a prescribed notice "by publication or otherwise as the court in its discretion may deem proper," should appoint a hearing, hear evidence, determine whether and to what extent the condition of the assets of the corporation rendered an assessment of the stockholders necessary in order that the debts of the corporation and the expenses of the receivership be paid, how much, in view of the probable ability of the various stockholders to respond to the assessment, should be assessed per share, and, if it determined that an assessment was necessary, it was provided in § 3 of the act, "the said court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify.

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in said order." Such order was to direct the receiver to collect the amount of the assessment from the parties liable therefor and, if necessary, to prosecute actions "wherever such party may be found, whether in this State or elsewhere." It was provided by § 5: "Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment." By § 11 it was provided that, if, "after the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings, there shall remain any surplus money or property in the hands of the receiver, the same shall be distributed, under the direction of said court and in such a manner as may be just and equitable, among those stockholders who have paid the assessments levied against their stock as herein provided."

On April 16, 1902, the receiver of the Minnesota Thresher Manufacturing Company filed in the court which appointed him a petition which averred that that corporation, by reason of the foreclosure of its mortgage by the Massachusetts Loan and Trust Company, was "wholly without assets or property of any sort or nature out of which the claims of the creditors of the said defendant or any part of such claims can be paid, collected or realized," set forth in detail the condition of the stock of the corporation, and averred that he had "already incurred a very considerable expense in conducting the examination necessary to properly advise" the court "as to the situation regarding said stockholders and their solvency, and that it is impossible at the present time to determine the expense of administering this trust and collecting the liability of the stockholders for the benefit of the creditors herein, but your petitioner avers that owing to the fact that legal proceedings will have to be instituted in many different States and in many different counties of the different States and against so large a number of stockholders, and in view of the fact that the amount involved in such litigation is large and the responsibility of the same is great, that in considering the amount for which assessment

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should be levied a very considerable sum must necessarily be added for the expense of collection and administration," and he therefore prayed "that for the purpose of providing funds for the payment of the expenses of this receivership in the enforcement of such stock liability, and for the payment of the indebtedness of said defendant, as the same may be proved and allowed in this action and proceeding, this court, by its order herein, may direct and levy a ratable assessment upon all parties liable as stockholders of said corporation, or upon or on account of any shares of stock of said corporation for such amount, proportion, or percentage of the liability for or on account of each share of stock, as the court shall deem proper after hearing, as by law provided, and to that end your petitioner prays that this court, by its order, may appoint a time for hearing this petition and the application herein contained, and direct such notice of such hearing to be given as to the court may seem proper."

A proper notice of the hearing on the petition was given and certain stockholders from New England, of whom the defendant in this case was not one, represented by C. P. Searle and J. H. Benton, Jr., Esquires, among other counsel, contested the levying and ordering of the assessment. But the court on December 22, 1902, ordered an assessment of $18 per share on the capital stock of the corporation and that, "in case any person . . . liable as a stockholder . . . shall fail to pay the amount hereby assessed against the share or shares of stock held or owned by such stockholder, . . . within the time hereinbefore specified, said receiver is hereby directed and authorized to forthwith institute and prosecute such action or actions or other proceedings against such person . . . in any court having jurisdiction, whether in this State or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount due . . . under the terms of this order."

The contesting stockholders appealed to the Supreme Court of the State, who, by a decision reported as *Merchants' National Bank* v. *Minnesota Thresher Manuf. Co.* 90 Minn. 144, dismissed the appeal, holding that, in determining whether the corporation was one of those excepted from the terms of art. 10, § 3, of the Minnesota constitution, it was "immaterial that" it "was organized under the statute providing for organizing manufactur-

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ing corporations or what the actual intention of the incorporators was, or that the corporation in fact carried on only a manufacturing business, but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized"; and that, as to the corporation in question, of the two purposes stated in its articles, the first, "the purchase of the capital stock, evidence of indebtedness and assets" of the Northwestern Manufacturing Car Company, appeared to be independent of the second one, the manufacture of certain things, "nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood or iron, or either of them."

Thereupon the receiver brought this action. The presiding judge on the foregoing facts found for the defendant, and the plaintiff appealed.

E. P. Howe, (*B. D. Hyde* with him,) for the plaintiff.

J. H. Benton, Jr., (*C. P. Searle* with him,) for the defendant.

BRALEY, J. This is an action of contract to recover the amount of an assessment levied upon the defendant as a stockholder in the Minnesota Thresher Manufacturing Company, a foreign corporation, by the laws of whose domicil his liability must be determined. *New Haven Horse Nail Co.* v. *Linden Spring Co.* 142 Mass. 349, 355. Article 10, § 3, of the constitution of Minnesota, provides: "Each shareholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him." If the company comes within the exception, this provision is inapplicable. But, while there is much weight in the defendant's argument that, the mercantile purpose of reorganization having been to take over the assets and to continue the manufacturing business of the old concern, whose creditors were to be paid in preferred stock of the new company, its stockholders are exempt, this question must be considered as no longer open under the adverse decisions of the Supreme Court of Minnesota, in *State* v. *Minnesota Thresher Manuf. Co.* 40 Minn. 213, and *Merchants' National Bank* v. *Minnesota Thresher Manuf. Co.* 90 Minn.

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144. Inasmuch as that court possessed exclusive jurisdiction of the subject matter and of the corporation, the judicial construction given by it to this section cannot be reinvestigated in our courts, and the judgments therein rendered must be deemed conclusive. *Van Norman* v. *Gordon*, 172 Mass. 576. *Harding* v. *Harding*, 198 U. S. 317. This provision therefore entered into the corporate organization, constituting a part of the contract between the company and the State, and each member, whether he became such at organization or afterwards, assented to this condition imposed for the benefit of creditors. The obligation, even if created by operation of law, nevertheless was essentially contractual in character, and, if the corporate assets were insufficient to satisfy the debts of creditors, the defendant, while he remained a stockholder, voluntarily had entered into an implied contract to assume the deficiency to the amount of the par value of his holding. *Howarth* v. *Lombard*, 175 Mass. 570, 574, 575. *Anglo-American Land Co.* v. *Dyer*, 181 Mass. 593, 595. *Pulsifer* v. *Greene*, 96 Maine, 438. *Olson* v. *Cook*, 57 Minn. 552. *First National Bank* v. *Winona Plow Co.* 58 Minn. 167. *Whitman* v. *Oxford National Bank*, 176 U. S. 559. *Bernheimer* v. *Converse*, 206 U. S. 516. See Cook on Corp. (5th ed.) § 223, n. 2, for a collection of cases. Compare *McClaine* v. *Rankin*, 197 U. S. 154. It becomes of no importance to consider the question upon which there is some conflict in the cases, whether the organic law was self-executing without the aid of a specific remedy to enforce it and the defendant who had become bound could have been compelled to perform his promise by suit either at common law or in equity, as a statutory remedy had been provided. *Willis* v. *Mabon*, 48 Minn. 140. *McKusick* v. *Seymour Sabin & Co.* 48 Minn. 158. *Marshall* v. *Sherman*, 148 N. Y. 9. *Windham Provident Institution* v. *Sprague*, 43 Vt. 502. Gen. Sts. of Minn. c. 76, §§ 5897, 5905, 5911.

But it was decided in the cases of *Minneapolis Base Ball Co.* v. *City Bank*, 66 Minn. 441, and *Hale* v. *Allinson*, 188 U. S. 56, that, under the equitable remedy provided by this chapter, as the action must be brought in behalf of all creditors against the corporation and delinquent stockholders over whom the court had jurisdiction, the receiver appointed to collect the assessments had no authority by virtue of his office to proceed against non-

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resident stockholders in the courts of their domicil. It thus being obvious that, as the law stood, while resident stockholders could be made to respond, foreign stockholders escaped, further legislation was enacted to supplement existing statutes by providing a form of procedure which would remove the jurisdictional difficulty. Gen. Laws of Minn. 1899, c. 272. The authority of the Legislature to enlarge the remedy by which non-residents who were stockholders at the date of enactment could be reached and made to respond must be considered as established by the local decisions in which this statute has been construed. *Straw & Ellsworth Co.* v. *Kilbourne Co.* 80 Minn. 125. *London & Northwest Mortgage Co.* v. *St. Paul Park Improvement Co.* 84 Minn. 144. It is well settled that the Legislature may enlarge the remedy, if the substantive right is left unimpaired. *Danforth* v. *Groton Water Co.* 178 Mass. 472. *Dunbar* v. *Boston & Providence Railroad*, 181 Mass. 383. *Rogers* v. *Nichols*, 186 Mass. 440. *Ewell* v. *Daggs*, 108 U. S. 143. *Campbell* v. *Holt*, 115 U. S. 620. And the defendant, although a non-resident, had acquired no vested immunity from liability upon an unbarred existing contract, simply because, until suitable legal procedure could be provided, the pursuing creditor must turn back at the State line.

By the provisions of the supplemental act, where a receiver had been appointed, the court was authorized to ascertain the probable indebtedness and the value of corporate assets which could be applied in payment. If found inadequate, authority was conferred to levy upon stockholders for the deficit, including the estimated expenses of the receivership and costs of collection. Gen. Sts. of Minn. c. 76, § 5897. Gen. Laws of Minn. 1899, c. 272, §§ 1, 2. It accordingly follows that the plaintiff's right to maintain this suit depends upon the regularity of the proceedings in which decrees were entered appointing him receiver and levying the assessment. If sustained as valid, then the plaintiff, who had become the representative of the creditors, was empowered to enforce in the courts of the defendant's domicil his obligation as a debtor, which attached to and followed his person. *Minnesota Thresher Manuf. Co.* v. *Langdon*, 44 Minn. 37. *St. Louis Car Co.* v. *Stillwater Street Railway*, 58 Minn. 129. *Howarth* v. *Lombard, ubi supra; Howarth* v. *Angle*,

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162 N. Y. 179. *Broadway National Bank* v. *Baker*, 176 Mass. 294. *Putnam* v. *Misochi*, 189 Mass. 421. *Hancock National Bank* v. *Farnum*, 176 U. S. 640.

We proceed to consider the requirements, a full compliance with which must be shown before the defendant can be concluded by the decrees. A judgment having been obtained, upon which an execution had issued and been returned wholly unsatisfied, the petitioning creditor then became entitled to have a receiver appointed, who not only should sequestrate and marshal any corporate property applicable to the payment of debts, but thereafter, if such action became requisite, could institute further proceedings to reach and apply as assets the secondary liability of stockholders. Gen. Sts. of Minn. c. 76, §§ 5905, 5906, 5911. Gen. Laws of Minn. 1899, c. 272. *Minnesota Thresher Manuf. Co.* v. *Langdon*, *ubi supra*. The judgment against the company and the subsequent decree appointing a receiver cannot be collaterally attacked, as the court had jurisdiction, and there is no suggestion that either was fraudulently procured. *Hinckley* v. *Kettle River Railroad*, 80 Minn. 32. *Thayer* v. *New England Lithographic Steam Printing Co.* 108 Mass. 523. *Old Colony Boot & Shoe Co.* v. *Parker-Sampson-Adams Co.* 188 Mass. 557, 566–568. But this decree would have been fruitless, unless the next step could have been taken, as the company appears to have been hopelessly insolvent. By the interlocutory decree which followed upon the receiver's petition, the court granted this further relief, and, being a part of the principal suit, this decree is conclusive, even if entered without affording the defendant an opportunity to be heard personally. He still remained a member, and, in the proceedings to marshal its property and to reach and apply the further security of his liability, the corporation was so far his agent that he must be considered as present by representation for the purposes of the suit. *Howarth* v. *Lombard*, *ubi supra*. *Glenn* v. *Williams*, 60 Md. 93. *Hawkins* v. *Glenn*, 131 U. S. 319. *Hancock National Bank* v. *Farnum*, *ubi supra*. *Bernheimer* v. *Converse*, *ubi supra*. *Hanson* v. *Davison*, 73 Minn. 454, 462. *Merchants' National Bank* v. *Minnesota Thresher Manuf. Co.*, *ubi supra*.

The further argument that the enabling statute was in violation of art. 1, § 10, of the Constitution of the United States,

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because it changed to his detriment the defendant's obligation arising out of his contract, requires no comment, as this question, having been directly involved therein, has been conclusively settled against that contention by the decision in *Bernheimer* v. *Converse*, 206 U. S. 516.

But, the decree having included an estimated sum for the probable expenses of the receivership and of collection by suit of the assessment, the defendant argues that this increase forms no part of the amount for which he is answerable. The suit, to which in all its stages he must be considered a party, was set on foot for the sole purpose of liquidating the indebtedness of the company. In order to make the remedy effective, the instrumentality of a receiver was indispensable, and the word "expenses" as used in this statute, besides including his compensation, also comprised the entire disbursements required to maintain the principal suit by which the necessity of a resort to the liability of stockholders had been established, and the suits by which, if necessary, the right could be enforced against delinquents. Gen. Laws of Minn. 1899, c. 272, § 3. If, by the addition of expenses, the maximum liability of the defendant had been exceeded, a more difficult question would be presented, but as yet this limit has not been reached, and the measure of recovery in the present suit is the assessment levied, including interest from the date when it became due and payable by the terms of the decree. *Harper* v. *Carroll*, 66 Minn. 487. *Wheeler* v. *Millar*, 90 N. Y. 353, 362. *Palmer* v. *Bank of Zumbrota*, 72 Minn. 266. *Bernheimer* v. *Converse*, *ubi supra*.

The judgment for the defendant must be reversed, and judgment in favor of the plaintiff as receiver is to be entered in the sum demanded in the declaration, with interest from the date of the writ.

So ordered.

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GEORGIANNA J. GURNEY *vs.* JOHN A. TENNEY & others.

Middlesex. November 11, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Deceit. Conspiracy. Pleading, Civil, Declaration. *Sale. Practice, Civil,* Exceptions, Conduct of trial.

The declaration in an action of tort against three persons alleged that each of the three defendants separately made false and fraudulent representations of facts to the plaintiff, knowing them to be false, that he, being ignorant of their falsity, relied thereon and consequently was damaged, contained in its last paragraph the allegation that the representations "were made by the defendants upon an understanding between themselves as a conspiracy for the sole purpose of deceiving the plaintiff," and concluded with the statement, "For which the plaintiff brings this action against the defendants as conspirators to recover his money back." *Held*, that the allegations of conspiracy were not the gist of the action, but that the right of the plaintiff to recover rested upon the damage wrongfully inflicted upon him by the tortious acts of the defendants.

In an action of tort for deceit against three persons, there was evidence tending to show that each defendant made false representations of facts to the plaintiff, knowing them to be false and intending that the plaintiff should act upon them, that the plaintiff, not knowing the representations to be false, did so act and consequently was damaged. There was a verdict against all three defendants, one of whom alone excepted to a refusal by the presiding judge to direct a verdict in his favor because of a lack of evidence of a conspiracy among the defendants. *Held*, that, the representations of the excepting defendant being actionable, the plaintiff was entitled to recover against him quite apart from any joint plan to defraud on the part of all the defendants.

Representations by one who is a subscriber to the stock of a corporation organized for the purpose of manufacturing and selling a patented invention, that he himself had invested $2,000 in the stock, that the investment was paying him twelve per cent, that the corporation already was on a paying basis and owned real estate, and that its treasurer was a man of wealth, ability and character, if they are false, are known to the person making them to be false, and are made to a woman who did not know them to be false and for the purpose of inducing her to buy stock in the same corporation, are actionable if the woman, relying upon them, buys the stock and it proves to be of no value, since they are false representations of facts and not mere seller's or promoter's talk or representations of something to be done in the future.

An action of tort for deceit against three defendants was tried with an action against one of the three of the same nature, brought by the same plaintiff and arising out of the same state of facts, and there was evidence introduced which it was proper for the jury to consider against all three defendants if there was a conspiracy or combination among them to defraud the plaintiff, but which it was improper for them to consider if there was no conspiracy or combination. The presiding judge refused to rule at the request of one of the defendants that

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there was no evidence of such conspiracy or combination which included him and left the matter to the jury to determine under appropriate instructions. There was a verdict for the plaintiff against all the defendants. The defendant who made the request excepted to the refusal of the presiding judge to grant it. There was evidence tending to show that the plaintiff, a dressmaker, upon going to one of the other defendants on other business, on that defendant's own motion was advised to invest in the stock of a certain corporation, and to see the treasurer of the corporation, (another of the defendants but not the one excepting) and that, in giving the advice, the first defendant made various representations of fact with regard to the treasurer and the company and accompanied the plaintiff to him; that, at a later interview, the same defendant suggested that the plaintiff go to the excepting defendant, an oculist, for treatment for her son, stating that such defendant had invested in the stock of the corporation; that the plaintiff went to see the excepting defendant as suggested and he, on finding out from whom she came, while treating her son, strongly urged the plaintiff to invest in the stock of the corporation; that the plaintiff had several interviews, first with one defendant and then with another, that all of the defendants were subscribers for the stock of the corporation which was in need of working capital, all were well acquainted with one another, and that all of them made practically the same representations to her, which were false. *Held*, that there was evidence warranting a finding that there was a conspiracy or combination among the defendants to defraud the plaintiff.

An exception to a refusal by the judge presiding at a trial to give a ruling in the language requested will not be sustained where the instructions given on the subject to which the request related were full, correct and appropriate.

TORT for deceit. Writ in the Superior Court for the county of Middlesex dated September 9, 1903.

There were three defendants, Tenney, Conant and Robinson. The declaration alleged that the plaintiff went to Conant, who held herself out as a "spiritualist medium" and represented to the plaintiff that she could tell her what she would do in the future in business which would add to her comfort and fortune in a financial way; that, in the course of a number of interviews and "readings," Conant volunteered to make and did make to the plaintiff certain representations of facts regarding a "very valuable invention in regard to electric lighting," then owned by a corporation organized for the purpose of manufacturing the invented article, and that she herself had invested in preferred stock of the company; and that she stated that Robinson was a man of wealth and strict integrity and a heavy investor in the company, and that Tenney also was a stockholder; that thereupon, believing Conant, the plaintiff interviewed Tenney and Robinson, each of whom made similar statements; that all the statements made by the defendants were "false and fraudulent

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as the defendants well knew," were made with the intention of deceiving the plaintiff and of inducing her to invest money in the company, that she was ignorant of the falsity of the statements and believed them to be true, and invested money in the stock which proved to be worthless. The closing paragraph of the declaration, mentioned in the opinion, was as follows: "And the plaintiff says that all the statements made in regard to the said stock of said company and in regard to the business thereof, the purchase of land on which to erect a factory, the company being the owner of such a valuable electric lamp, the great saving of electricity in giving more light, were false and fraudulent and then known by defendants to be false and fraudulent, and were made by the defendants upon an understanding between themselves as a conspiracy for the sole purpose of deceiving the plaintiff, and she was deceived thereby, and thereby defrauding the plaintiff out of her money for their mutual benefit by the purchase of said stock. For which the plaintiff brings this action against the defendants as conspirators to recover her said money back."

The case was tried at the same time with another one of the same nature against Robinson only before *Bishop*, J., and the plaintiff's testimony tended to establish the following facts: She was a dressmaker and, having lost a son and having read in the Banner of Light, a paper published by spiritualists, what purported to be messages and communications of the defendant Conant from the "spirit world," she went to interview her. There were a number of successive interviews, at the first of which Conant "gave the plaintiff messages from her son," and told her that she (the plaintiff) was in very poor health and gave her some medicine. At the second interview, she gave the plaintiff "more messages," told her she could never do any more work and asked her why she did not invest her money "where it would give large returns," and asked her if she knew about the Continental Electric Company. In the course of subsequent interviews, Conant urged the plaintiff to invest her money in stock of that company, and advised her to go to see Robinson, the treasurer of the company, representing that Robinson was a wealthy man, and that he had put a good deal of money into the business of the company, that the company

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owned land in Pembroke, and had more orders for electric lights than it could fill, that she, Conant, had put $2,000 into the preferred stock of the company, and was drawing twelve per cent on the investment.

Finally, because of Conant's urging, the plaintiff went with her to meet Robinson, who in detail told the plaintiff that the electric light which the company was manufacturing was a very valuable article, and in detail represented to the plaintiff in that and subsequent interviews that he, Robinson, was a wealthy man, and had put a great deal of money into the company, in both preferred and common stock, that the company had orders to furnish lights for the South Station in Boston, then in the process of construction, for the streets of Boston, for Macy's store in New York City, and for other large establishments, that it had more orders than they could fill in six months, had secured land in Pembroke, was on a paying basis, and was paying twelve per cent; that the defendant Conant had bought preferred stock, and that the defendant Tenney had bought preferred stock.

About a week after her interview with Robinson, the plaintiff had another "sitting" with the defendant Conant at which, the plaintiff chancing to remark that she must not stay long as her son Rudolph was home from Technology because of a steel filing in his eye, and telling Conant upon inquiry that her family physician was treating the injury, Conant said she should go to a specialist, and stated that the defendant Tenney was one of the finest oculists in Boston, and also that he was interested in the Continental Electric Company. The next day the plaintiff with her son Rudolph went to see the defendant Tenney.

According to the testimony of the plaintiff and her son Rudolph, at the first interview with Tenney, the first question he put to the plaintiff was, "Who sent you here?" The plaintiff informed him that the defendant Conant had sent her. While examining Rudolph's eye, Tenney asked him what course he was pursuing at Technology, and, being answered "Naval architecture," Tenney told him he should study electricity, and presently asked the plaintiff and her son if they had heard of "the new invention," from which the conversation turned to the subject of the Continental Electric Company and investment therein, Tenney, at many succeeding interviews, telling the

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plaintiff that she would make no mistake to invest her money in the company, representing to her that he himself had invested $2,000 in the preferred stock of the company, that the investment was paying him twelve per cent, that the company was already on a paying basis and owned land in Pembroke, and that the defendant Robinson was a man of wealth and of ability and character.

Repeated interviews with Robinson and Conant and Tenney followed one another, and finally the plaintiff invested $6,000 in preferred and common stock of the Continental Electric Company.

Further evidence introduced by the plaintiff tended to show that the representations of all the defendants above set forth were false and that the stock that she purchased was worthless.

It further appeared that all of the defendants were subscribers for stock of the Continental Electric Company, which had been formed to take over the assets of the Higham Electric Company, upon its becoming insolvent, and that the latter company had been formed to take over the assets of the Higham Electric Light Company for a similar reason. Conant and Robinson had invested money in the two previous companies.

Several dividends of twelve per cent had been paid to the plaintiff on the personal check of the defendant Robinson after her investment, but the company had made no earnings.

Evidence of the defendant Tenney tended to controvert that of the plaintiff.

At the close of the evidence the defendant Tenney requested the following rulings:

"1. Upon all the evidence, the plaintiff cannot recover against the defendant, John A. Tenney.

"2. If the defendant Tenney ever represented to the plaintiff that the lamp was a very valuable invention as it would effect the saving of thirty-three and one third per cent of electricity in giving the same light that any lamp then in use would give, that he considered it to be a very valuable invention, and so much so that he had invested $2,000 of his own money in the preferred stock of the Continental Electric Company, that the defendant Robinson had invested a large amount of money in said company, and that the defendant Conant had invested $2,000 in the preferred

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stock of said company, that said Robinson was a wealthy man, also a man of the highest integrity and was not obliged to carry on any business in order to make a living, that he had an income without, that all money thereafter paid in was to be used for the sole purpose of building a factory and manufacturing and putting upon the market said patent lamps, all of said representations were either immaterial, 'dealer's talk' or expressions of opinion and are not actionable.

"3. There is no evidence of a conspiracy to which the defendant Tenney was a party.

"5. Upon all the evidence the defendant cannot be held liable for any representation made by the other defendants, or either of them.

"6. If the defendants or either of them ever represented to the plaintiff that the defendant Conant could give the plaintiff a true reading and could tell her past and what she should do in the future in business and other ways which would add to her comfort and fortune in a financial way, that the defendant Conant and the defendant Tenney were stockholders in the Continental Electric Company and had each invested $2,000 of their own money in the preferred stock of the same, that the defendant Robinson was a man of strict and of the highest integrity, that he was very wealthy, had plenty of money, was a wealthy man, that he was not obliged to carry on any business, that he possessed enough property to live on the income, that his business as treasurer and manager of the company was only a pastime, that he put in his money merely as an investment and that he had invested a large amount of money in the company, that the lamp was a valuable invention, as it would effect a saving of thirty-three and one third per cent of electricity in giving the same light that any lamp then in use would give, and that all money thereafter to be paid in was to be used for the sole purpose of building a factory and manufacturing and putting upon the market said patent lamps, all of said representations were either immaterial, 'dealer's talk,' or expressions of opinion and not actionable."

The presiding judge refused to rule as requested, but did rule that "if an act done by [one of the defendants alone] does not constitute a cause of action, a like act is not rendered actionable

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by being done in pursuance of a conspiracy." He also charged the jury in part as follows:

"There is a distinction in law between statements of fact and statements of belief, opinions, judgment. If one person makes statements to be of facts to another, which are false, and which the person making them knows to be false, or has ground to know are false, and these statements operate to induce the person to whom they are made to put his money into a transaction on the faith of it, and these statements are of matters of fact, there can be recovery for the damage sustained by them. But there is another class of statements which are not statements of facts; they are opinions, they are beliefs, they are expressions of one's judgment. The law says that recovery cannot be had for these; and these statements as they usually come into cases are largely concerned with possibilities and likelihoods and the state of things in the future, and the law says that they are expressions of opinion: are expressions of what a man believes and thinks, and there can be no recovery for those. . . . It is not for the court to say whether both of these two things are included in any given case or not; it is for the jury to say. But often we have a case where the evidence tends to show statements of fact which are relied upon by the plaintiff as false and deceitful and as fraudulent and as tending to induce transactions to be made, and which the plaintiff says was the inducement which operated to cause him to part with his money, — those statements of fact; and, at the same time, statements in regard to expectations, to beliefs, to what is going to be. It is not a ground of action for a man to say to another man, 'I believe this will be, I expect things of this enterprise' — 'I believe I can make my fortune out of it, and that you can if you will invest in it.' If that is all there is to it, however without foundation such expectations and such beliefs and such operations of the man's mind, who makes those assertions, may be, that is relegated by law to the domain of assurances, expectations, beliefs. But if a man says, 'this property which I wish you to buy' — I am not now speaking of this case, but I am trying to illustrate this case — 'this property which I wish you to buy is situated in such a place, it is such and such property,' describes it, 'and I bought it for so much; I paid so much

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money for it,' and goes on with a list of statements of fact about it, if those statements of fact are false, if the man to whom those statements were made believes them and relies upon them and puts in his money on the faith of them, and they turn out to be false and known to be so to the person making them, and with the purpose of obtaining money upon the strength of them, an action will lie to recover damages for the loss.

"I have some requests in this case from the defendants, [referring to defendant Tenney's second and sixth requests,] which deal with facts assumed. These requests refer to this matter. I will not read them unless counsel desire me to go into this matter more in detail than I have done, but deem it sufficient to say to you what I have said as to the distinction between the two classes of representations. . . .

"I have already said that in their nature there is no difference between the two suits being tried before you, they are for deceit, for obtaining money by false representations relied upon. There is a difference in this, and it is an important difference; the acts and statements of all three of these defendants have been put into the case, the plaintiff has gone into the conduct, statements and acts of Robinson, Tenney and Conant. Now, if there was no combination between them, no conspiracy, the acts and conduct of one of these persons cannot affect in evidence the other or others. But if there was a combination, if there was joint action, if there was a result to be obtained which they were striving for with a common purpose, a connected and combined action, so that you shall say there was a conspiracy between these three persons, or any two of them, to do this, then the law says that the acts and sayings of each one are admissible and may be considered as affecting the other or others. So that you must determine, in order properly to try the second case, whether there was conspiracy; and a conspiracy is a union of action, a purpose to accomplish an end which shall be unlawful in its character. If you do not find that, the only evidence which you can consider against each of these defendants is that relating to himself alone, what he has said and done, and the case upon all the evidence as it affects him, and not as it develops what the others or another one of the others has said or done. And I will add

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this, gentlemen, as requested by the defendant Tenney: it also is true that if the act done by one alone does not constitute a cause of action, a like act is not rendered actionable by being done in pursuance of a combination or conspiracy. That is, several persons acting together for a lawful and proper purpose does not make the act unlawful. The nature of the thing, whether it is alone by one person, or by several together, must be the accomplishing of an unlawful result by deceit."

The bill of exceptions states that to the above rulings and refusal to rule the said John A. Tenney excepted. There was a verdict against all of the defendants.

The case was submitted on briefs.

W. H. Thorpe, for the defendant Tenney.

G. A. A. Pevey, F. W. Dallinger & W. Shuebruk, for the plaintiff.

BRALEY, J. The allegations of conspiracy in the closing paragraph of the declaration are not the gist of the action, as the right to recover rests upon the damage wrongfully inflicted upon the plaintiff by the tortious acts of the defendants. *Parker* v. *Huntington*, 2 Gray, 124. While it does not appear that the representations of one defendant more than those of another influenced the plaintiff, yet the case is before us on the exceptions of Tenney alone, and if the representations made by him were actionable, the plaintiff would be entitled to recover quite apart from any joint plan to defraud. In his interviews with her, after being informed that she had money to invest, he stated in substance that he had invested in the preferred stock of the company, whose treasurer was a man of character, ability and wealth, and that the company was then on a paying basis earning twelve per cent, and owned land upon which a large factory for the manufacture of lamps was to be built. The defendant's argument asks us to treat these representations as mere expressions of matters of opinion, or as partly promissory. But these positive statements were material assertions of the value of the property, upon which the jury could say that for his personal benefit he intentionally persuaded and induced the plaintiff to buy its stock by falsely representing in various ways that the company was financially sound and well managed, and that it owned real estate soon to be used for manufacturing

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purposes. *Collins* v. *Denison*, 12 Met. 549. *Cole* v. *Cassidy*, 138 Mass. 437. *Pike* v. *Fay*, 101 Mass. 134, 137. *Lewis* v. *Jewell*, 151 Mass. 345. *Andrews* v. *Jackson*, 168 Mass. 266. *Weeks* v. *Currier*, 172 Mass. 53. *Arnold* v. *Teel*, 182 Mass. 1. *Lee* v. *Tarplin*, 183 Mass. 52. When employed as a means to this end, they cannot be classed as mere over statements of value, which under one form or another have been designated as mere seller's or promoter's talk, nor of something to be done in the future; and therefore the defendant's first request for rulings was rightly denied. *Whiting* v. *Price*, 172 Mass. 240, 241. *Lee* v. *Tarplin*, *ubi supra*, p. 57.

The third request asked for a ruling that the evidence failed to establish any combination to defraud the plaintiff. It is manifest from their evidence that the defendants as stockholders had a common interest and purpose in the promotion of the success of a company in immediate need of working capital, which could be obtained only from money received from the sale of its preferred and common stock. If, after this motive for their conduct is disclosed, the course of affairs is followed from the time the plaintiff first met the defendant Conant, by whom she was sent to Tenney, and who advised her to see Robinson, and they all three respectively suggested and urged the purchase of the stock by substantially similar statements, a legitimate inference of a concert of action between them to persuade the plaintiff to make the investment would be well warranted. It also would follow that, if they acted jointly, each would be liable for any actionable representations made by the others by which the wrong was finally accomplished. *Spaulding* v. *Knight*, 116 Mass. 148. *Commonwealth* v. *Scott*, 123 Mass. 222, 235. *Brinkley* v. *Platt*, 40 Md. 529. Both issues were matters of fact for the jury to decide under suitable instructions, and the exceptions to the refusal to give the third and fourth requests are not well taken.

The second and sixth requests asked for rulings that certain of the representations of each and all of the defendants were not actionable. But the refusal to instruct in the language requested affords no ground of exception, as the presiding judge fully, correctly and with appropriate illustrations directed the attention of the jury to the distinction between representations

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which they might find to be material, and those which were merely expressions of opinion. *Graham* v. *Middleby*, 185 Mass. 349. *Andrews* v. *Jackson*, *ubi supra*.

Exceptions overruled.

MARY J. GALLAGHER *vs.* INHABITANTS OF WATERTOWN.

Middlesex. November 14, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Defect in highway.

A hole in the concrete of a sidewalk which has existed for more than a year, caused by cutting away the concrete in the removal of a lamp post, the excavation after the removal of the post having been filled with earth, which afterwards settled, leaving an uneven surface with the edges of the concrete "to a certain extent rough and rounded," may be found to be a defect in a highway of a town.

TORT for personal injuries alleged to have been caused by a defect in the concrete sidewalk of Main Street, a highway of the defendant, between eight and nine o'clock in the evening of October 31, 1903, when the plaintiff, a girl fifteen years of age, who had been doing some shopping, was on her way home with her sister and another companion. Writ dated February 1, 1904.

In the Superior Court the case was tried before *Hitchcock*, J. The evidence in regard to the alleged defect is described in the opinion. The judge refused to order a verdict for the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

W. A. Abbott, for the defendant.

D. L. Smith, for the plaintiff.

BRALEY, J. In walking over one of the public ways within the town, the plaintiff received injuries by stepping into a hole of which she had no previous knowledge. Upon the question of her due care, the case presents no peculiar features to distinguish it from the recent cases of *Torphy* v. *Fall River*, 188 Mass. 310; *Campbell* v. *Boston*, 189 Mass. 7, and *Bennett* v.

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Everett, 191 Mass. 364, where it was held that this issue was properly submitted to the jury.

The principal contention of the defendant, however, is, that there was no evidence either of a defect or of its negligence. But if the descriptions of the extent of the depression which had existed for over a year were variant in some particulars, there was a general agreement of the witnesses, that in the removal of the lamp post set in the sidewalk near the curb, the concrete had been cut away, and after removal the hole had been filled with earth, which subsequently settled leaving an uneven surface. In describing the edges of the concrete, one of the plaintiff's witnesses said, that they were "to a certain extent rough and rounded," while the defendant's superintendent of streets referred to them, as "not particularly ragged," as there were no projecting stones. But the duty of municipal corporations in regard to the proper maintenance or repair of public ways, and under what circumstances either a defect can be found to have existed, or they should be charged with negligence in not making suitable repairs, has been so fully considered in *Moynihan* v. *Holyoke*, 193 Mass. 26, and in *Mason* v. *Winthrop*, 196 Mass. 18, that no useful purpose would be served by further discussion.

Under the authority of these decisions this question also was one of fact, and the request of the defendant that a verdict be ordered in its favor was rightly refused.

Exceptions overruled.

GEORGE A. DICKEY *vs.* TRUSTEES OF THE PUTNAM FREE SCHOOL.

Essex. November 15, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Contract, What constitutes, Implied: common counts. *Putnam Free School.*

The Trustees of the Putnam Free School, a corporation established under St. 1838, c. 85, to maintain a free school in Newburyport, having an income from a fund bequeathed to it for that purpose, made an agreement of co-operation with the city of Newburyport in connection with the high school of that city,

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whereby the corporation furnished the school building at a fixed annual rent to be paid by the city and agreed to maintain and heat the building and keep it in repair, and the teachers of the high school appointed respectively by the school committee of the city and the trustees of the corporation were subject to approval by the other board, so that they became the choice of both bodies. The corporation agreed to pay the salaries of those teachers other than the principal which were appointed primarily by its trustees, and to contribute toward the salary of the principal, if he was satisfactory to the trustees, all above a certain sum not exceeding a maximum amount. A principal was re-elected by the school committee to serve for an ensuing school year, whereupon the trustees of the corporation voted "neither to approve nor disapprove" of his election. The school committee stood by its action and the principal accepted the election and served during the year. He was paid $1,600 by the city, and sued the corporation for $400 in an action of contract, with two counts, the first count alleging an express contract to pay him that sum for his services during the school year, and the second count being upon an account annexed. It appeared that, shortly after the plaintiff's election by the school committee, the trustees of the defendant notified the committee that they declined to "pay any portion of the principal's salary for the ensuing year." There was evidence on which it could be found that the plaintiff first had been elected a number of years before at a salary of $2,000, which he understood had not been changed during the succeeding years, although he knew that $1,600 was the amount paid to him by the city and that the remaining $400, until the last year, had been paid to him regularly by the defendant. It did not appear that the plaintiff had any knowledge of the contents of the agreement of co-operation between the city and the defendant, or that he ever received from the trustees of the defendant any notice of their official action in refusing to pay his salary. He knew of a meeting of the school committee at which the matter was discussed and at which the defendant was represented, but his information of the meeting included the statement that the city solicitor, who was present, gave the advice, that under the vote of the trustees the plaintiff's election as principal must be considered valid. The plaintiff testified that he never had been aware of any dissatisfaction on the part of the trustees as a body and possessed no direct information of their official action. After the school opened it was conducted in the usual way. Pupils belonging exclusively to the defendant's school were in attendance and received the usual instruction, and some of the defendant's trustees, including the secretary, were present in the school from time to time. At the close of the school year the plaintiff, as principal of the school, in the presence of the defendant's secretary, signed and presented the diplomas of the graduating class, which bore also the signatures of the trustees. *Held*, that on the first count the plaintiff could not recover, there being no evidence of an express contract, but that the plaintiff was entitled to go to the jury on his second count on the ground of an implied contract, there being evidence on which it could be found that the defendant accepted the benefit of the plaintiff's services, without which its school could not have been conducted, knowing that they were not intended to be gratuitous, without giving the plaintiff any express notice that he must be content with what the city paid or else resign.

CONTRACT against the Trustees of the Putnam Free School, a corporation established by St. 1888, c. 85, with two counts, the first count alleging that the defendant engaged and con-

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tracted with the plaintiff to be a teacher in its school at Newburyport for the school year beginning in September, 1898, and ending in June, 1899, for the sum of $400 for his services for such school year, that the plaintiff performed the services and that the defendant failed to pay him as agreed, and the second count being upon an account annexed for $400 and interest. Writ dated July 21, 1902.

At the trial in the Superior Court before *Wait*, J., evidence was presented which is described in the opinion. The judge ordered a verdict for the defendant on the first count, on the ground that there was no evidence of an express contract, and submitted the case to the jury on the second count on the ground of an implied contract. The jury returned a verdict for the plaintiff on the second count in the sum of $489.04, which afterwards was corrected as to the computation of interest to be $605.60; and the judge reported the case for determination by this court. If there was any evidence for the jury upon either count, judgment was to be entered upon the verdict.

The case was submitted on briefs.

J. H. Casey, N. N. Jones & C. T. Smith, for the defendant.

H. I. Bartlett & D. N. Crowley, for the plaintiff.

BRALEY, J. In execution of the trust created by the will of Oliver Putnam, and under the enabling statute of incorporation, the private school for which he provided had been successfully founded and maintained. St. 1838, c. 85. At some period this school and the high school of the city of Newburyport had been unitedly administered, yet the arrangement for a joint administration does not appear to have been perfected until the agreement and plan of co-operation were adopted and made permanent in 1885. If the educational functions of the united schools were substantially similar, the foundations upon which they rested were legally distinct. The high school maintained by the city was a public institution supported by taxation, and subject to the exclusive control of the school committee, while the Putnam Free School was a private institution maintained by the income derived from the fund, and subject only to the control and supervision of the trustees under the act of incorporation. They could not delegate to the school committee the discharge of their fiduciary duties, nor could the committee

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confer upon them any of the statutory powers in the selection of teachers, or the management of the high school with which they were clothed. R. L. c. 42, §§ 25–38. *Merrick* v. *Amherst*, 12 Allen, 500, 508. *Jenkins* v. *Andover*, 103 Mass. 94. Under the coalition, while both schools might be lawfully housed in the same building, and with the sanction of the committee instructed by the same teachers, yet when in operation they were distinct educational organizations, and neither became merged in the other. By the terms of the agreement the city paid a fixed annual rental for the use of the school building, which the defendants were to keep in repair, and also were to provide fuel and pay the janitor, while each body, acting separately in the appointment of teachers, approved the selection made by the other, so that the principal and his assistants consequently became the choice of both of the governing bodies. A possible question concerning the expenditure of the public revenue for the support of a private institution was further avoided by the provision, that with the exception of the principal of whose salary, if he was satisfactory to them, the trustees were to contribute all over a certain sum, but not to exceed a maximum amount, the salary of the teachers primarily appointed by the trustees was to be paid by them. In practical operation the arrangement seems not only to have been feasible, but to have worked satisfactorily, until the disagreement over the reappointment of the plaintiff as principal for the last school year of his service. After he had been duly re-elected by the school committee, upon receiving notice of their choice, the trustees voted "neither to approve nor disapprove" of his election, and as the committee did not recede, the plaintiff, having accepted, served during the year. But so far as his claim for salary rests on an express contract with the defendants, he cannot prevail. If the trustees, when acting as a corporate board, could ratify the action of the committee, and thus bind the defendant to the performance of the contract, the answer is, that their vote fails affirmatively to express approval, and there was no ratifying act. The plaintiff's argument, that ratification follows from their subsequent conduct as individuals in remaining silent with full knowledge of the circumstances, is groundless, as shortly after, the trustees notified the committee that under the first clause of

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the agreement "they declined to pay any portion of the principal's salary for the ensuing year." The express contract made with him by the committee never having been the contract of the defendants, the ruling that he could not recover on the first count was correct.

It was open, under the second count, however, for the jury to find, that the plaintiff had been originally elected at a salary of $2,000, which he understood had not been changed during the succeeding years, and although in the annual notice received from the committee, it was stated to be $1,600, this sum represented only the amount paid by the city, while the difference, until the last year, had been regularly paid to him by the defendant. Notwithstanding this, the contention is made that upon receiving the last notice he should have understood that his position for the year had become that of principal of the high school only, as the trustees were powerless either to dismiss or retain him, and, if he chose to remain, any services rendered in the instruction of private pupils was purely gratuitous. But it nowhere appears that he had any knowledge of the contents of the joint agreement, or ever received from the defendant any notification of their official action. In a general way, from the comment in the public press, his attention may have been called to some of the particulars of the meeting of the school committee, at which the defendant was represented, but this information also included the explicit statement, that the city solicitor, who was in attendance, advised that under the vote of the trustees his election as principal must be considered valid. While copies of the subsequent votes by which the defendant declined to pay any part of the salary were promptly sent to the committee, yet the plaintiff, who testified that he never had been aware of any dissatisfaction on the part of the trustees as a body, or possessed any direct information of their official action, remained unnotified. The general course of dealing previously followed, and his lack of any authoritative knowledge, due to the inaction of the defendant, would warrant a finding, that when the plaintiff began the term, he had reasonable cause to believe, that under a contract which in form of expression did not differ from those of former years, even if later it turned out to be binding only on the city, he was serving as the principal of both schools. After

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the term opened the schools were conducted in the same manner as before. Pupils belonging exclusively to the defendants' school were in attendance, and received the usual instruction, and some of the trustees, including the secretary, were in attendance from time to time. At the close of the school year the plaintiff as principal, in the presence at least of the secretary, signed and presented the diplomas of the graduates, which also bore the signatures of the trustees. Nor is the evidentiary force of this testimony destroyed either by the fact that the bills for services, although sent each month, remained unpaid, or that in response to demands made upon him for payment, the letter of the secretary to him while offering to present his bill to the trustees, also for the first time called attention to the vote "not to pay any portion of the salary of the principal for the ensuing year." It still could be found from plenary evidence that, with knowledge of all the circumstances, the defendant accepted the benefit of his services, which they well knew were not intended to be gratuitous, and without which its school could not have been conducted. To say that having done so, it ought not to be held to pay for them, when by an appropriate notice the plaintiff could have been decisively informed that he must be content with what the city paid, or else resign, is to permit the defendants not only to retain the value of his unrewarded labor, which it did not refuse to accept, but indirectly to oblige the taxpayers of the municipality to contribute to the support of a private institution of learning.

The case, therefore, was properly submitted to the jury, and the verdict in favor of the plaintiff must stand. *Van Deusen* v. *Blum*, 18 Pick. 229. *Zerrahn* v. *Ditson*, 117 Mass. 553. *Day* v. *Caton*, 119 Mass. 513, 515. *Worthington* v. *Plymouth County Railroad*, 168 Mass. 474. *Spencer* v. *Spencer*, 181 Mass. 471.

Judgment for the plaintiff on the verdict.

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JAMES S. HEY *vs.* WINFIELD F. PRIME, executor.

Suffolk. November 17, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Motion to dismiss. *Jurisdiction. Survival of Suits. Husband and Wife. Words*, "Damage to the person."

A motion to dismiss an action of tort against an executor, on the ground that the defendant's testator died before the action was brought and that under R. L. c. 171, § 1, the action did not survive, may be made at any stage of the case, because if the allegations are true the court is deprived of all jurisdiction.

An action of tort by a husband for consequential damages incurred by reason of personal injuries to his wife does not survive under R. L. c. 171, § 1, not being an action for "damage to the person" within the meaning of that statute.

TORT against the executor of the will of James F. Ginn for loss of the services and society of the plaintiff's wife, Marion Hey, by reason of injuries sustained by her on February 13, 1905, from falling on an accumulation of ice in the cellar of a building numbered 129 on Boylston Street in Boston, which at the time of the injuries was owned and controlled by the defendant's testator. Writ in the Municipal Court of the City of Boston dated August 4, 1906.

It appeared by the writ and the declaration that James F. Ginn, the defendant's testator, was dead when the action was brought. The answer contained a general denial, and alleged payment and the payment of all expenses for medicine and medical attendance.

On appeal to the Superior Court the case came on to be tried before *Pierce*, J. After the jury were empanelled and after the plaintiff had read the pleadings and had made his opening, the defendant filed the following motion to dismiss the action: "Now comes the defendant and moves to dismiss this action because in the declaration and the opening statement of counsel for the plaintiff the cause of action, as set forth, if any, does not survive."

The plaintiff in his opening stated the facts to be as alleged in the plaintiff's writ and declaration. No further facts bearing upon the question of the survival of the action were stated.

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The question of the survivorship of the action never had been raised by the defendant in his pleadings, either in the Municipal Court or in the Superior Court, until after the opening statement of the plaintiff in the Superior Court. The judge ruled that the defendant was entitled to have the action dismissed on the ground that the cause of action did not survive. He allowed the motion, and made an order that the action be dismissed. The plaintiff alleged exceptions.

E. W. Crawford, for the plaintiff.

W. W. Kennard, (*W. F. Prime*, & *W. J. Drew* with him,) for the defendant.

BRALEY, J. If upon an opening, the plaintiff fails to state a case, ordinarily the defendant may request that a verdict be ordered in his favor. The presiding judge, in his discretion, then either may give a decision or wait until the plaintiff's, or the entire evidence has been introduced, before deciding the question. But, although no demurrer had been filed, or request made, it was not too late for the defendant to move to dismiss, if the declaration and the facts stated in the opening showed that the cause of action did not survive, as the court was left without jurisdiction. *Allin* v. *Connecticut River Lumber Co.* 150 Mass. 560, 563, and cases cited. *Merriam* v. *Currier*, 191 Mass. 133. *Corcoran* v. *Higgins*, 194 Mass. 291.

By the common law, the right of the husband to recover damages for an injury to his wife, whereby either her services or consortium became lost, perished with the death of the wrongdoer. The injury inflicted, being the act of the tortfeasor, who escaped by death, his executor or administrator could not be held, because the executor or administrator had committed no wrong in his personal capacity, and the plea, which must have been not guilty, raised only the issue of the decedent's guilt. *Wilbur* v. *Gilmore*, 21 Pick. 250, 252. But this rule having been modified by statute, the question is, whether such an action survives under R. L. c. 171, § 1. This section, which follows previous revisions, provides, that ". . . actions of . . . tort for assault, battery, imprisonment, or other damage to the person" shall not abate by death. Gen. Sts. c. 127, § 1. Pub. Sts. c. 165, § 1. Unless the case comes within the last clause, the plaintiff is not relieved. It has uni-

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formly been held since the enactment of St. 1842, c. 89, § 1, to which this clause runs back for its origin, that the nature of the damages sued for, rather than the form of remedy, is the test. By this construction, the language, "or other damage to the person," includes such damages only as result from direct bodily injury, but excludes consequential damages suffered by those who are injured from a wrongful interference with their rights arising from the negligence of the decedent. *Smith* v. *Sherman*, 4 Cush. 408, 413. *Cutter* v. *Hamlen*, 147 Mass. 471. *Wilkins* v. *Wainwright*, 173 Mass. 212, and cases cited. *Dixon* v. *Amerman*, 181 Mass. 430. If the common law doctrine of unity of husband and wife, by which she was deemed a part of his person, has been almost wholly abrogated by legislation, yet the right to her exclusive conjugal fellowship still remains, and he may recover damages for its impairment by the wrongful acts of strangers. *Nolin* v. *Pearson*, 191 Mass. 283, 285, 286. But, while this right has been preserved, if during coverture she suffers personal injury, whether it results from the direct act of the decedent by the use of force, or is caused by his negligence, she alone, by reason of our statutes conferring upon her absolute control over her person and the right to sue as if sole, can maintain an action for damages, which upon recovery become her separate property. *Nolin* v. *Pearson*, *ubi supra*. *Duffee* v. *Boston Elevated Railway*, 191 Mass. 563, 564. But where the husband also brings suit, because the disability arising from the tort has deprived him of either her services or matrimonial companionship, his right to recover rests upon the ground that the wrong suffered by him, while personal in effect, is regarded as purely consequential in character. *Barnes* v. *Hurd*, 11 Mass. 59. *Kelley* v. *New York, New Haven, & Hartford Railroad*, 168 Mass. 308, 311.

It is plain that under the statute such an injury cannot be classed as "damage to the person," and the motion to dismiss was granted properly.

Exceptions overruled.

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MARGARET R. PEMBROKE *vs.* CAMBRIDGE ELECTRIC LIGHT COMPANY.

Middlesex. November 15, 18, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employers' liability.

When an experienced lineman in the employ of an electric light company is working, as one of a gang of men under the direction of a superintendent of the company, in substituting new electric wires on the poles of the company for others which are dangerous for want of proper insulation, the workmen being aware of the cause of the replacement and knowing also that while the reconstruction is in progress the company will supply electricity for lighting through the old wires upon the poles on which they are working, it is not the duty of the company, or of its superintendent in charge of the work, to warn or instruct such a lineman in regard to the perils of his employment, which he knows as well as his employer or the superintendent, especially where the lineman is permitted to perform the work in his own way with an opportunity for unrestricted observation of his dangerous environment.

TORT under R. L. c. 106, §§ 73, 74, by the widow of Charles W. R. Pembroke, to recover for the instantaneous death of her husband while in the defendant's employ as a lineman. Writ dated November 15, 1905.

In the Superior Court the case was tried before *Pierce*, J. It was admitted that the plaintiff was the widow of Pembroke, who was instantly killed on August 28, 1905, while working upon a wire belonging to the defendant, attached to a pole on Massachusetts Avenue near Martin Street in Cambridge. Notice of the time, place and cause of the injury was given, and no question was raised as to the notice. At the time of the injury the deceased was about forty-five feet above the ground, standing upon a cross arm on the pole, and was engaged in the work of tying in a new wire upon a glass insulator which was attached to a pin in the cross arm immediately above the one upon which he was standing. The cause of the accident is described in the opinion.

At the close of the plaintiff's evidence, the defendant asked the judge to rule that upon the evidence the plaintiff could not recover. The judge said, "I am inclined to think that this

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condition was a condition which was obvious to all these linemen at the time of their employment; consequently, I shall direct a verdict for the defendant." He ordered a verdict for the defendant; and the plaintiff alleged exceptions.

C. Reno, for the plaintiff.

J. Lowell and *J. A. Lowell*, for the defendant.

BRALEY, J. The plaintiff has no ground of exception to the ruling made at the trial. By R. L. c. 106, §§ 71, 73, 74, under which this action is brought, recovery is denied unless the death of the employee is caused either by the negligence of the employer, or of a person for whose negligence the employer is responsible. If the record is somewhat voluminous, the essential features relating to this question are easily distinguishable. The electric wires of the defendant's system having become dangerous for want of proper insulation, new wires were to be substituted, and a gang of men, including the decedent, who was an experienced lineman, were sent out to perform the work, under the direction of a general foreman of the company. The old wires when in position rested on cross arms of six pins each, equally divided by the pole. Of these wires, the second in each group was used to carry a current of electricity of sufficient voltage to operate motors, while those remaining, consisting of two on each side nearest the pole, and two at each end of the cross arm, respectively designated as the "pole pin" and "end pin wires," were used to supply electricity for running the lights. If the current in the motor wires was not dangerous to life, each of the lighting wires was charged with an alternating current, sufficiently high to cause the death of those who might come into contact with them. The pole and end pin wires on the street side were left uncharged, but during the process of reconstruction the corresponding wires on the other side of the arm, where the decedent stood, were in operation while new wires were being substituted. In the substitution, the new wires after being raised were tied in with the old on the insulators by the use of "short tie wires," and while doing this work the plaintiff's husband stood on a second cross arm a little more than two feet below the first. Before tying the end pin wires, the motor wire had to be untied, and, after that had been attached to the insulator, retied. It is manifest from the testi-

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mony of his fellow workmen, that, having secured the pole and end pin wires, he then had to step from the lower, over the upper cross arm, to reach a position where he could retie the motor wire. While making the change, he apparently would have incurred no danger if the pole pin wire had been properly insulated. But about ten inches from the cross arm, and attached to this wire, over which a few turns had been taken, were the remains of a discontinued copper "tap wire," which had been cut off leaving a very short projecting end. On changing his position, he was obliged to step over the tap wire, which had become charged with the alternating current, when its end penetrated his body at the groin. It could have been inferred from the different descriptions of what followed, that from the shock he either fell upon the wires or instinctively to prevent falling almost simultaneously grasped one of them, making a short circuit through which the electricity passed, causing his death. It is further stated, that when the workmen began they all knew the cause of replacement and that, while reconstruction was in progress, the defendant would supply electricity for lighting through the pole and end pin wires in use at the time of the accident. The decedent, who was a practised and skilful workman, had been informed of these general conditions, and must have been aware of the danger. During readjustment, the arrangement of the various wires, the shifting from one position to another required while fastening them, the bare wire in proximity to his person alive with electricity, were not only clearly visible, but, in the light of his general knowledge, obvious. But if these conditions are uncontroverted, the plaintiff contends that they did not embrace the remains of the tap wire. The day, however, was clear, and, even if this wire originally bright had become oxidized, resembling in color the pole pin wire, yet, from where the decedent stood on the lower cross arm, it not only was unconcealed, but was immediately within his vision. Nor is this all. He was not hurried while tying the wires, but was permitted to perform the work in his own way, with an opportunity of unrestricted observation which the dangerous environment demanded. If generally the employer, or those who under the statute stand in his place, owes a duty to an employee to warn or instruct him as to abnormal

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dangers, this duty is not violated, where from either the character of the work, or other sources, the employee is possessed of all the information which the employer could have furnished regarding such perils. Because of his previous knowledge, experience and means of ascertaining the obvious conditions under which his work must be performed, the decedent had been put in possession of all the elements of danger attendant upon his employment. The failure of the defendant, or of its foremen, who could have been found to have been entrusted with superintendence, to instruct the decedent, where for these reasons no instructions became necessary, furnished no evidence of the defendant's negligence; and a verdict in its favor was rightly ordered. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511, 513, 514, and cases cited. *Regan* v. *Lombard*, 192 Mass. 319, 323.

Exceptions overruled.

MARY E. HADDEN, administratrix, *vs.* CITY OF SOMERVILLE.

Middlesex. November 19, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Way, Defect in highway. *Ice and Snow.*

Under R. L. c. 51, § 19, providing that a city or town shall not be liable for an injury upon a way "by reason of snow or ice thereon," an excavation four feet in length and about one and a half feet in depth cut through the snow and ice above the surface of a street of a city, near the curb, for the purpose of allowing surface water to drain into a catch basin, cannot be found to be a defect in the way.

TORT under R. L. c. 51, § 17, by the administratrix of the estate of Thomas H. Hadden to recover for his death by reason of an alleged defect in Washington Street in the city of Somerville. Writ dated April 29, 1904.

In the Superior Court the case was tried before *Sherman*, J. The following facts appeared from the evidence at the trial. Washington Street at the time of the accident was a public way, extending from Cambridge through Somerville to Boston, and at the place of the alleged defect was fifty-five feet in width be-

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tween the edgestones of the sidewalks. Two lines of street railway tracks occupied fourteen feet in the centre of the street. There was much snow and ice at the sides of the roadway. On the right hand side going toward Boston was a catch basin for receiving surface water from the street. It was situated beneath the sidewalk and had an opening through the lower part of the edgestone. In front of the opening a hole had been dug through the snow and ice for the purpose of allowing the surface water to enter the catch basin. This hole constituted the alleged defect or want of repair complained of. There was evidence from which the jury could find that it was there for a day or two before the accident. It was about four feet in length along the edgestone and about one and a half feet in depth, and extended about one and one half feet from the edgestone. The catch basin was connected with the general sewerage system of the city in order to allow the surface water to pass away but it was not constructed or maintained for the benefit of the sewerage system. No revenue or assessments accrued to the city in connection with the construction or maintenance of the catch basin.

The plaintiff's intestate at the time of the accident was driving in the daytime toward Boston in the car tracks on Washington Street in a two horse covered wagon. The horses became frightened at a heap of steaming manure on the left hand side of the street and shied toward the right. There was evidence from which the jury could find that the plaintiff's intestate was in the exercise of due care, that the wheels of the wagon entered the hole at the catch basin, that the wagon tipped over and that he thereby received injuries from which he died. Due notice of the time, place and cause of the injury was given to the defendant.

The foregoing was all the material evidence in the case.

At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. He refused to make this ruling, but privately informed counsel for both the parties that in his opinion the plaintiff was not entitled to recover, but that he would submit the case to the jury, and if a verdict should be given in favor of the plaintiff he would order the verdict set aside and report the case. The jury returned a verdict for the plaintiff, and the judge reported the case for determination by this court. By agreement of the

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parties, if upon the foregoing evidence the plaintiff was entitled to recover, judgment was to be entered for the plaintiff in the sum of $900; otherwise, judgment was to be entered for the defendant.

F. W. Kaan, for the defendant.

E. R. Anderson & A. Lincoln, for the plaintiff.

BRALEY, J. This is an action under R. L. c. 51, § 17, to recover damages for the death of the plaintiff's intestate, to be assessed with reference to the degree of the defendant's culpability. If the right given by this section is independent of the right given by § 18 to recover compensation for conscious suffering during his lifetime, caused by an injury received from a defective highway, under either section the plaintiff must prove that the municipality failed to maintain the way in a reasonably safe condition for the use of travellers. *Bowes* v. *Boston*, 155 Mass. 344. It is undisputed that, when bare, the street was in suitable repair, and the principal question is, whether an opening four feet in length, and about one and a half feet in depth, excavated through snow and ice, near the curb, for the purpose of allowing surface water to drain into a catch basin, constituted a defect for which the defendant is responsible. The answer turns upon the construction to be given to R. L. c. 51, § 19, which relieves cities and towns from liabilities for injuries caused by snow or ice thereon, if the portion of the way where the accident happened was at the time otherwise reasonably safe and convenient for travel. Before the statute, if in consequence of public travel over accumulated snow or ice the surface became rough and uneven to such an extent as to render its use dangerous, the way might be found defective. *Stanton* v. *Springfield*, 12 Allen, 566. But while this liability no longer exists, the plaintiff contends that the defendant is not within the exemption, as the statute was not intended to say that an artificial condition created by the municipality, or by a volunteer of whose acts it could be found to have had constructive notice, for the express purpose of draining the streets of water from melting snow and ice, may not create an actionable defect. The argument accordingly is, that it was not merely snow and ice from climatic causes, or as changed into unnatural formations arising from the exigencies of public use, into which the wheels

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of the intestate's wagon sank, but they passed into a hole or channel which was none the less an artificial obstruction, even if the sides may have been formed of snow and ice more or less compacted. But if the temporary channel itself was neither produced by a natural formation of snow and ice, nor as the result of the use of the street, yet the accident would not have happened but for these elements. The efficient cause within the meaning of the statute was no less decisive, because aided by human agency, than if the channel had been formed by the pressure of the water forcing an opening for itself, when of course the defendant would not have been liable. In the recent case of *Newton* v. *Worcester*, 174 Mass. 181, which was followed in *Bailey* v. *Cambridge*, 174 Mass. 188, it was said by Mr. Justice Hammond, "We think the proper and only reasonable interpretation of the statute is, that whenever ice or snow is the sole proximate cause of the accident, there shall be no liability, but where at the time of the accident there is any other defect to which as a proximate cause the accident is in part attributable, there may be a liability notwithstanding the fact that it also may be attributable in part to the ice or snow." In the practical application of this construction, it further was said, ". . . the attention is to be directed to the actual physical condition of the way for the purpose of ascertaining whether there is at the time any other danger to the steps of the traveller than that arising from the presence of ice or snow. If there be no other danger, then for the time being the way is 'otherwise reasonably safe and convenient." The "other danger" referred to is some defect either in its structural condition or an obstruction to travel which exists independently of snow or ice. If left as precipitated, or as subsequently affected by climatic action alone or the passing of travellers, neither creates a defective condition, even if thereby a public thoroughfare becomes dangerous. But a city or town is subject to indictment and fine, if it neglects to maintain a highway when encumbered with snow in a reasonably suitable condition for the use of the public. R. L. c. 51, § 23. It would measurably reimpose the liability, which in the broadest terms has been abolished by the statute, if the removal by any reasonably safe method of an obstruction arising solely from the existence of snow or ice, in some stage of

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natural formation, where except for their accumulation the highway is roadworthy, were held to create an actionable defect. In the extreme and sudden changes of our winter climate, the proper performance of this duty, under § 10, which requires surveyors and road commissioners to cause snow to be removed or so trodden down as to make the ways reasonably safe and convenient, may often demand that they should be temporarily drained, or else they may become not only unsafe but impassable. *Loker* v. *Brookline*, 13 Pick. 343, 346. *Kidder* v. *Dunstable*, 11 Gray, 342, 343. The provisions of § 19 should be construed with §§ 10 and 23, as forming a consistent system whereby cities and towns are exempted from actions by travellers who may be injured because the way has become obstructed by snow or ice, while in the interest of the public a penalty is imposed, if their statutory duty to remove the obstruction is either wholly neglected or negligently performed. It, therefore, cannot be said, that an artificial opening for the purpose of drainage, made through the snow or ice but not extending below the surface of the soil, whether done by the public authorities or by some one for whose acts the city could be found liable, renders the street dangerous in the sense that it constitutes either a defect in the roadway or an obstacle to travel for which the defendant should be held responsible in damages. If the practical working rule which we have adopted as following such a construction is too strict in its limitation of the right of recovery, the Legislature has the power to change it.

Judgment for the defendant.

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F. ROCKWOOD HALL, trustee, *vs.* JOSEPH MIDDLEBY, JR., INC.

Suffolk. November 19, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Landlord and Tenant, Deposit to secure payment of rent, Ouster, Termination of lease. *Bankruptcy.*

The lessee under a lease in writing of a building carried on a retail confectionery business upon the premises and conveyed his stock in trade and fixtures to the lessor in mortgage to secure the payment of the rent. The terms of the mortgage were that, upon default, the lessor, after ten days' notice in writing and three weeks' publication, might sell the property mortgaged at public auction, that, until default, the lessee might remain in possession, but that, upon default, the lessor might take immediate possession of the mortgaged property. The lessee sublet portions of the premises. Rent was due under the lease on the first of the month. Before the expiration of the lease, the rent not having been paid on the first day of a certain month, the lessor three days thereafter entered under the mortgage, took possession of the personal property and of the business of the lessee, sold the property at private sale in the regular course of the retail business, collected rent from the lessee's subtenants, and continued thus in possession for over a month, when he gave to the lessee a notice in writing that he had terminated the lease and taken possession of the premises. *Held*, that the acts of the lessor constituted a complete ouster of the lessee.

By the terms of a lease in writing of a building, the lessee was to pay the rent and an amount "on account of taxes" in advance on the first day of each month, and he deposited with the lessor a sum of money, which was less than the amount of the payment due each month, to secure the monthly payments. Nothing having been paid on the first day of a certain month, the lessor ousted the lessee on the fourth day of the month. The lessee thereupon brought an action of contract against the lessor to recover the amount deposited with him. The lessor contended that the whole of the monthly payment became due on the first of the month, and that consequently he had a right to apply the deposit toward its payment. *Held*, that the rent could not be apportioned, and, the consideration of a month's rent and a monthly instalment of the taxes being a month's use of the premises, that that consideration failed upon the lessor's interruption of the use; and that therefore there was nothing due to the lessor which would warrant him in refusing to return the deposit.

One who was lessee under separate leases of two different buildings deposited with the lessor a sum of money to secure to him the payment of the rent, and then assigned his lease of one of the buildings to a partnership of which he was a member. Rent was payable under both leases in advance on the first day of each month, and, it not having been paid under either lease on the first day of a certain month, the lessor gave proper notice to the partnership and entered upon the premises then held by them, but ousted the lessee from the other building on the fourth day of the month. On the twelfth day of the month the lessee filed a petition in bankruptcy under the bankruptcy act of 1898, and a trustee subsequently was appointed. Thereafter the partnership paid the rent due under the lease assigned to them, and the trustee in bankruptcy brought an action to re-

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cover the amount of the deposit made with the lessor by the lessee. *Held*, that the trustee in bankruptcy on his appointment became vested with the right, which was the lessee's at the time he filed his petition in bankruptcy, to enforce repayment of the deposit when all instalments of rent whose payment it secured were paid.

CONTRACT by the trustee in bankruptcy of one Basil Vesaxes to recover $1,000 paid by Vesaxes to the defendant as security for the payment of monthly rent due under the terms of a lease from the defendant to him. Writ in the Superior Court for the county of Suffolk dated December 5, 1904.

The case was tried before *Bell*, J., without a jury, upon an agreed statement of facts, of which the following are material:

The defendant on August 20, 1903, executed a lease to Vesaxes of premises numbered 16 and 18 on Winter Street in Boston, the annual rental being $12,000, and the lessee agreeing to pay $1,000 as rent and $170.20 "on account of taxes" on the first day of each month. On the same day the defendant executed to the plaintiff a lease of premises on Tremont Street. Coincidentally with the execution and delivery of the leases, Vesaxes paid to the defendant $1,000, which the defendant in a letter to Vesaxes acknowledged that it held "as collateral security for the punctual performance by you of all the covenants and agreements contained in two leases (covering Winter Street and Tremont Street properties) heretofore given by us to you."

On November 28, 1903, Vesaxes with the derendant's consent assigned the lease of the premises on Tremont Street to a partnership of which he was a member. On the same day he executed and delivered to the defendant a note for $1,500 payable in one year from its date, and, to secure the note, a mortgage upon "all the stock in trade, fixtures, furnishing, tools and utensils" at 16 and 18 Winter Street, "and also all stock in trade, fixtures, etc., which the said Vesaxes might add to the premises thereafter." The provisions in the mortgage as to foreclosure and possession were as follows: "But upon any default in the performance or observance of the foregoing condition, the grantee, or its successors or assigns, may sell the said goods and chattels at public auction, first giving ten days' notice in writing of the time and place of sale to me or my representatives, or publishing such notice once a week for three

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successive weeks in some one newspaper published in said Boston. . . . And it is agreed that the grantee, or its successors or assigns, or any person or persons in their behalf, may purchase at any sale made as aforesaid; and that until default in the performance or observance of the condition of this deed I [Vesaxes] and my executors, administrators, and assigns, may retain possession of the above mortgaged property and may use and enjoy the same, but after such default, the grantee or those claiming under it may take immediate possession of said property, and for that purpose may, so far as I can give authority therefor, enter upon any premises on which said property or any part thereof may be situated; and remove the same therefrom."

Coincidentally with the execution of the mortgage, the defendant executed under seal an instrument stating that it, as such mortgagee, acknowledged that it had received "said mortgage and the promissory note accompanying the same (the amount whereof is $1,500) as collateral security for the several performances by said Vesaxes of his obligations under two several leases of real estate given by said Joseph Middleby, Jr. (Incorporated) to said Vesaxes. One of said leases is dated April 6, 1903, and covers the building numbered sixteen Winter Street, in Boston; and the other of said leases is dated August 20, 1903, and covers the building twenty-one and twenty-three Tremont Street, in Boston. This mortgage and note constitute security additional to the sum of $1,000 in cash heretofore placed in the hands of said Joseph Middleby, Jr. (Incorporated); and in the event of default said $1,000 is to be first applied."

Vesaxes conducted a retail confectionery business upon the Winter Street premises, but, he having failed to pay the amount due under the terms of the lease on January 1, 1904, on January 4 the defendant filed in the office of the city clerk of Boston a notice of intention to foreclose under the mortgage, entered upon the premises, "took and retained possession of same, ousted and evicted said Vesaxes from same, put its own agents and servants in charge and proceeded to conduct a retail confectionery business in said premises, and to sell the said stock in trade of Vesaxes at private sale to the entire exclusion of the said Vesaxes then and thereafter, and collected from the other tenants rent due February 1."

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On January 12, 1904, Vesaxes filed his petition in bankruptcy and the plaintiff was appointed his trustee on January 28. On February 12 the defendant gave to Vesaxes and to the occupants of the Winter Street property notice in writing that it had terminated the lease to Vesaxes for breach of its conditions, and had entered and taken possession of the premises.

In the meantime, the lease of the Tremont Street property held by the partnership of Vesaxes and another had been terminated by the defendant, and, on March 18, 1904, a settlement had been reached and all rent due under that lease was paid in full and satisfied.

The presiding judge found for the plaintiff and the defendant appealed.

F. Burke, for the defendant.

J. H. Sherburne, Jr., for the plaintiff.

BRALEY, J. The deposit, the right to which is in dispute, cannot be deemed liquidated damages to be exacted as a penalty, for, by the express stipulation of the defendant's agreement, the money constituted a collateral fund to secure the performance of the lessee's covenants and to indemnify the lessor if it suffered damages from their breach. But, before the security could be applied in payment of rent which was due in advance on the first day of each month, the rent must have been in arrears. The rent for the month in which the default is claimed having been neither paid nor tendered within three days after it became due, the defendant, who had a mortgage of the lessee's stock in trade as additional security, took possession of the premises, from which it excluded him, and then proceeded to carry on the business, while selling the mortgaged property at retail. But under the power, even if the conditions of the mortgage as modified by the collateral agreement could be considered to have been broken by a failure to pay either the note at maturity or the monthly rental, the defendant could sell only at public auction. While, for the purposes of foreclosure, the mortgagee could enter to take possession of the mortgaged property, the defendant was not empowered to eject the mortgagor, and then sell at retail. If the interruption had been temporary, it would have operated only to suspend payment of the rent until possession had been restored, but the defendant remained in occu-

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pation and collected the rents due from tenants of the lessee. These unauthorized acts constituted a complete ouster. *Leadbeater* v. *Roth*, 25 Ill. 587. The rent for the succeeding month remaining unpaid, the defendant gave to the lessee, who meanwhile had gone into bankruptcy, a notice that the lease had been terminated for breach of condition, and, it being conceded that the leasehold estate then ended, the question is, to whom does the money deposited belong?

During the entire period after the entry by the lessor, the lessee had been deprived of any enjoyment of the premises, and this dispossession ordinarily would have barred a recovery if he had been sued for the arrears, as the defendant was not entitled to the increment from the rental while unlawfully retaining the land from the use of which it arose. *Skally* v. *Shute*, 132 Mass. 367. But, having been payable in advance, the defendant contends that the covenant was broken before eviction, and hence payment could have been immediately enforced and the security applied. If it be assumed from the recitals in the agreed facts that the lease contained a condition whereby it became voidable if the rent remained unpaid, yet under the grant the estate of the lessee, who had entered into occupancy, vested for the whole term, subject, of course, to be defeated at the election of the lessor upon breach of this condition. *Fifty Associates* v. *Howland*, 11 Met. 99, 101. An eviction upon the rent day would have discharged the lessee, as the right to the rent in advance would have perished simultaneously with the termination of the leasehold. *Smith* v. *Shepard*, 15 Pick. 147. But, if not paid on that day, the monthly payments of rent could not be apportioned, and the consideration for a month's rent, whenever payable, was intended to be the equivalent of a full month's use of the premises. *Earle* v. *Kingsbury*, 3 Cush. 206. *Hammond* v. *Thompson*, 168 Mass. 531. The estate having been destroyed by the acts of the defendant shortly after the month began, the right, which would have been the lessor's if it had not interfered, to collect the rental value of the estate as measured by the rent which was reserved in the lease and had not been paid, or to convert the security in payment, was irrevocably lost. *Sutton* v. *Goodman*, 194 Mass. 389. *Hyman* v. *Jockey Club Wine Co.* 9 Col. App. 299. *Wreford* v. *Kendrick*,

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107 Mich. 389. Compare *Giles* v. *Comstock*, 4 Comst. 270, and *Hunter* v. *Reiley*, 14 Vroom, 480.

If the covenant to pay the taxes in equal monthly instalments was independent of the covenant to pay rent, yet this covenant also was dependent upon the tenant's being permitted to enjoy the estate, and, he having suffered an unlawful expulsion by the landlord followed by a termination of the lease, there was a complete failure of consideration which relieved him from this liability. *Hodgkins* v. *Price*, 137 Mass. 13, 19. *Griggs* v. *Moors*, 168 Mass. 354, 361. *Smith* v. *McEnany*, 170 Mass. 26, 27.

By the adjustment between the partnership and the defendant, the fund having been released so far as held for the performance of the covenants under their lease, the plaintiff as trustee in bankruptcy of the depositor is entitled to the money. U. S. St. July 1, 1898, c. 541, § 70 a; 30 Sts. at Large, 544.

Judgment affirmed.

LULU G. MacLAREN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 20, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Elevated railway, In care of station.

It is the duty of an electric railway company which maintains a station in a subway in a city to keep the stairways by which passengers enter and leave the station in a reasonably safe condition for travel.

Evidence tending to show that a stairway in a station of an electric railway in a subway in a city, which was used by passengers as a means of exit from the station, was equipped with a suitable tread, but was allowed by employees of the company operating the railway and maintaining the station to become muddy and slippery, and that a passenger in leaving the station slipped upon the mud and was injured, will warrant a verdict for the plaintiff in an action of tort by such passenger against the railway company to recover for the injuries received by reason of the fall, because it would warrant a finding that the defendant did not maintain the stairway in a reasonably safe condition.

TORT for personal injuries alleged to have been received by the plaintiff by reason of her falling upon the steps of a station of the defendant at Scollay Square in Boston. Writ in

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the Superior Court for the county of Suffolk dated October 16, 1903.

At the trial, which was before *Hitchcock*, J., it appeared that the plaintiff had arrived at the Scollay Square subway station on an elevated train from Park Street, that the step upon which she fell was about half way up the second flight toward the street, and that the steps were equipped with the Mason tread, which was a suitable one. Other facts are stated in the opinion.

At the close of the evidence, the presiding judge refused to direct a verdict for the defendant, the jury found for the plaintiff, and the defendant alleged exceptions.

H. S. MacPherson & W. H. Foster, for the defendant.

J. L. Putnam, for the plaintiff.

BRALEY, J. At the time of the accident, although the plaintiff had left the car on which she had been a passenger, it was the defendant's duty to maintain the stairway by which she must make her exit to the street in a reasonably safe condition for travel. *Keefe* v. *Boston & Albany Railroad*, 142 Mass. 251. If the defendant allowed the steps to become covered with a thin coating of mud, whereby they became slippery and unsafe, it failed to perform this duty and is liable in damages for the injury. Upon the conditions of the weather at the time, the parties were sharply in conflict. The evidence for the plaintiff described them as unpleasant, with a hard rain in the morning, although fairly clear in the afternoon, while the defendant's witnesses, with one exception, testified that after seven o'clock the day was cloudy with a mist or slight trace of rain until nearly noon, followed by a dry and pleasant afternoon. They were equally in discord as to the condition of the steps. By the plaintiff's description, in ascending she stepped upon some wet mud, with which they were covered, and fell face downwards. But the defendant's porter, watchman, and station master all concurred in saying that the steps had been kept covered with sawdust during the rain or mist, and that, when it ceased, they were cleaned and had become dry before the plaintiff passed over them. There was, however, uncontradicted evidence that the day of the accident had been preceded by nearly a week of rain, and that, in the arrangement of the station, one stairway was used for both ingress and egress, divided

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by a hand rail. If the street had become muddy from continued rain or dampness, the jury from common experience would be warranted in finding that mud, which under these conditions necessarily must have been tracked in and deposited by incoming and outgoing passengers, might remain on both sides of the stairway, or spread from one side to the other unless constantly removed.

It manifestly was for the jury under proper instructions to determine where the truth lay. If it appeared by their verdict that they accepted the plaintiff's narrative as being more consistent and credible than the testimony of the defendant's witnesses, this conclusion is not an error of law.

Exceptions overruled.

F. WARREN CLARK *vs.* MOSES H. GULESIAN.

Suffolk. November 20, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Pleading, Civil, Declaration. *Contract*, What constitutes, Performance and breach.

A declaration alleged that the defendant requested the plaintiff to submit an estimate and to make an offer of the amount for which he would erect a building for the defendant according to certain plans and specifications, and promised that, if the plaintiff's offer of a price was accepted, he, the defendant, would give to the plaintiff a bond conditioned upon the performance by the defendant of a contract for the erection of the building; that the plaintiff submitted an estimate and made an offer which the defendant accepted, and that the defendant promised to pay to the plaintiff a certain amount for the erection of the building from time to time as the work progressed, and to give the bond above mentioned; that the plaintiff had always been ready and willing to carry out the contract, but that the defendant refused to execute and deliver the bond. The defendant demurred. *Held*, that the demurrer must be overruled, since, although the principal purpose of the parties to the contract was the erection of the building, the giving of the bond was intended to be concurrent with the making of the contract and a condition precedent to performance by the plaintiff, and therefore there properly was alleged a contract which was broken by the defendant.

CONTRACT. Writ in the Superior Court for the county of Suffolk dated March 9, 1907.

The material portions of the declaration were as follows:

The defendant requested the plaintiff to estimate the cost of erecting and completing and requested the plaintiff to make an

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offer of a price for which the plaintiff would erect and complete a building on the corner of Harcourt and Irvington Streets in Boston in accordance with certain plans and specifications then and there shown by the defendant to the plaintiff; and the defendant promised and agreed that, if the said offer of a price for erecting and completing said building was accepted by the defendant, the defendant would execute and deliver to the plaintiff a good and sufficient bond in the sum of $20,000 conditioned on the performance in all respects on the part of the defendant of a contract for the erection and completion of said building in accordance with plans and specifications at the price named in said offer. The plaintiff estimated the cost of said building and made an offer of a price for which he would erect and complete said building. The defendant accepted said offer, and made an oral contract with the plaintiff "under the terms of which contract the plaintiff entered into an agreement with the defendant to erect and finish said building in accordance with said plans and specifications, and the defendant agreed to pay the plaintiff the sum of $77,500 for the erection and completion of said building from time to time as the work progressed and to execute and deliver a good and sufficient bond in the sum of $20,000 conditioned on the performance on the part of the defendant of all the obligations of said contract. And the plaintiff says that he has been always ready and willing to carry out said contract, but the defendant thereafter neglected and refused to execute and deliver any bond in accordance with his aforesaid contract, promise and agreement, and by reason of said neglect he has been unable to carry out said contract and prevented from carrying out said contract to the great damage of the plaintiff."

The defendant demurred. The first and second grounds alleged for the demurrer were general. Other grounds were, in substance, (4) that no complete and enforceable contract was set forth in the declaration, (5) that it did not appear what were to have been the provisions of the proposed bond, (8) that there was no breach of the contract alleged, and (9) that there was no consideration for the defendant's agreement alleged.

There was a hearing before *Lawton*, J., who sustained the demurrer. Judgment was entered for the defendant, and the plaintiff appealed.

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The case was submitted on briefs.

M. S. Case, for the plaintiff.

J. W. Pickering, for the defendant.

BRALEY, J. The declaration, after allegations of preliminary negotiations, sets forth the oral building contract into which the parties entered. By its terms, the plaintiff contracted to erect and complete a building according to certain plans and specifications, for which the defendant agreed to pay a fixed sum "from time to time as the work progressed," and to furnish a bond to secure the performance of his promise. The contract having contained no provisions as to the time within which the building was to be begun and finished or the bond given, the plaintiff became entitled to a reasonable time within which to perform, while the delivery of the bond was intended to be concurrent with the making of the contract. It evidently was the intention of the parties that full compensation was not to be made until completion, even if instalments were to be advanced as the work progressed, and, the contract being indivisible, performance by one party was conditioned upon performance by the other. *Fullam* v. *Wright & Colton Wire Cloth Co.* 196 Mass. 474. But, while the principal purpose was the erection of the building, yet the giving of security for the payment of the price was intended to be a precedent condition before performance by the plaintiff could be demanded. *Cadwell* v. *Blake*, 6 Gray, 402. The plaintiff alleges his readiness to have gone forward, but it is averred that the defendant absolutely refused to execute and deliver the bond, and this refusal prevented him from performance. By his unqualified refusal the defendant placed himself in default, and the plaintiff had the right either to rescind the contract, leaving him without any cause of action, or to treat it as terminated and bring suit for such damages as he had suffered from the breach. *Earnshaw* v. *Whittemore*, 194 Mass. 187, 191, and cases cited.

The necessary averments, upon proof of which the plaintiff is entitled at least to nominal damages, having been stated with substantial certainty, the declaration is sufficient, and the demurrer not well taken. R. L. c. 173, § 6.

Judgment reversed; demurrer overruled.

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ELLA D. WHITNEY *vs.* WELLESLEY & BOSTON STREET RAILWAY COMPANY.

Middlesex. November 20, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Conduct of trial, Judge's charge.

It is not a violation of the requirement of R. L. c. 173, § 80, that "the courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law," for a judge in his charge to elucidate the proper application of the legal principles involved in the case before him by illustrations drawn from common experience or by reference to cases where similar questions have been decided, or to define the degree of weight which the law attaches to a whole class of testimony; and if, by an unbiased analytical statement of the testimony and of the law, he distinctly indicates to the jury the party who is entitled to prevail, and a verdict is rendered for such party, the defeated party has no just reason to complain, especially if, a question being raised as to whether or not the charge was argumentative, the judge in full and unexceptionable language instructs the jury that what he had said by way of comment was only to make plain the issues, which were solely for their determination.

TORT for personal injuries received by the plaintiff while a passenger upon an open car of the defendant by reason of the seat in front of her breaking and falling against her leg. Writ in the Superior Court for the county of Middlesex, dated April 4, 1903.

There was a trial before *Bond*, J. The plaintiff testified that, just before she was injured, she had moved to the right end of the seat, preparatory to getting out, that she was facing the front, and that the heel of her right foot was toward the outside. She also testified that her right leg was injured. A superintendent of the defendant made an examination of the car and testified that, if the plaintiff was in the position that she testified to, she could not have been injured on her right leg. Other facts appeared as stated in the charge to the jury. The defendant contended at the trial that the inference to be drawn from the evidence was that the blow suffered by the plaintiff was on her left leg; that no substantial injury resulted; that the claim of injury to the right leg was a fraudulent claim advanced at the time of the trial either because some trouble had developed in that leg from entirely different causes, for which the plaintiff

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was seeking to hold the defendant responsible, or because the whole claim of injury, beyond a temporary bruise, was a fraudulent invention and the plaintiff actually had forgotten which leg was struck.

The presiding judge charged the jury with regard to the location and extent of the plaintiff's injury as follows:

"The question as to whether or not she was injured has arisen here in a singular way and calls for you to consider it fully and carefully. In the first place, Dr. Utley * testifies that the injury that was shown to him and which he examined was on the left leg of the plaintiff. You have to consider whether that is a mistake on his part; whether he has got some things confused there. It is not claimed that the plaintiff at any other time ever said that it was the left leg. Dr. McCollester was called, who saw the plaintiff before Dr. Utley made an examination, and he explains to you what the trouble was, and, perhaps, describes the evidence of the injury in the same way Dr. Utley does, but he says it was on the right leg. Then, one of the neighbors, the next morning after the injury, August 3, testifies to seeing the injury, and it was on the right leg. One of the other neighbors went in and assisted with reference to putting on the compress or bandages, and she says it was on the right leg, — and so some of the other neighbors, and they all say that it was on the right leg. Now, could Dr. Utley have made a mistake there and in his notes, without very much thought as to where the injury was, put it on the left leg? Well, of course it is for you to say whether that could have been done. It occurred to me that a person would not make that mistake sitting as you are standing, side by side, you could tell — although some queer things happen about that. I don't know whether you ever saw it this term, but very often people called up as witnesses are called up and told to hold up their right hand, and they get the left hand up. I don't know how, but they do sometimes; but, perhaps, that is caused by confusion, or by the fact of a little bit of disturbance mentally, so that they did not think. But you don't make that mistake with reference to yourself if you are asked

* Drs. Utley and Courtney testified on behalf of the defendant, and the other physicians on behalf of the plaintiff.

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which side; and a man standing next to you, you don't have any trouble with reference to him, whether it is his right or left; but when you are standing opposite, face to face, and he points out where his trouble is, do you have to stop and think, make a little mental calculation, as to whether that is the left side or the right side? Do you have to stop and think? Sometimes you have occasion to do that, and unless you do stop and think it may be that you will be thinking of your own side as the right side, and look at his same side, which is his left side, and think perhaps that is his right. Whether or not you don't go through a little mental process, when a man stands opposite to you, which you do not go into when he stands side by side, as you stand here. I don't mean to say that that is always so, but I suggest it for your consideration, as to whether or not that note did not get in there without very much thought, — perhaps it wasn't considered of much importance, — or whether the woman did really make a mistake and claim the injury was on one side when it was on the other. Of course if there had been no other evidence except that one time that may be one thing; but if you are satisfied that always at other times, both before and after, — and Dr. McCollester testified that at that very time it was spoken of as being on the right side and not on the left, — it is for you to say whether you believe that at that time there was a mistake made. It is not of so much consequence on the merits of the case, only as the testimony with reference to the complaints of the plaintiff before and after that as to the right side. Did she say by words or acts that it was on the left side at the time, on the fourth of August, that Dr. Utley was there, or is there a little mistake or confusion in his notes which he has referred to in his testimony as to which side it was on?

"Now, there is another piece of testimony which you have to consider and which bears on this same feature of the case: The witness who was called — Rosson — testified that he had experimented with a car and that he couldn't hit his right leg, but he could hit the left, — and bearing upon this question that the injury must have been on the left leg, if any was there; that there wasn't any on the right, because he couldn't get any injury to the right. Well, it is for you to consider whether that witness had misconstrued, or given too narrow or forced a construc-

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tion to the plaintiff's testimony here as to how the accident took place. The plaintiff testified with reference to it. And you will recall with reference to that, that she spoke about a bridge which crossed the Boston and Albany Railroad tracks at West Newton, and that she says the accident took place before she crossed that bridge, and back near an engine-house, I think she says; and that the place where she got off was after she had gone on and crossed the bridge some little ways, when the car stopped and she got off and took a Waltham car at West Newton. Now, she says it was some little distance from where she was hurt to where she got off. Now, I may be wrong about that, but I will suggest it to you for your consideration, whether or not the experiment with reference to this injury did not assume that the accident happened just when she was going to get off, and not quite a little distance back of it. And even then you should consider how people get off from an open car. Ordinarily you wouldn't look to see how a person got off. If you had to get off yourself, you would get off, perhaps, always in the same way, or a different way — I don't know — you may never stop to think how you get off from an open car. You know you get your foot out on to the running board in some way, but just how do you turn your limbs before you get off? Now, has the witness made some confusion there with reference to the testimony? As counsel for the plaintiff — in sitting here I couldn't see, but I assumed that he showed you how it might have happened — suppose the two limbs were out, and if you turn them over, turned the knees toward the right, it would bring the left leg up, and then it would be hit; you couldn't hit the right one, — your own good sense would tell you that. But suppose a party didn't do just that way. Supposing a party turns the knees the other way, towards the left, both of them, then could you hit the left one? Mustn't you hit the right one? . . . There isn't any real dispute here, as I understand it, with reference to the direction which the seat struck the limb, one or the other; there hasn't been any controversy at all about that. It wasn't on the knee-pan of either knee. It was below the knee-pan and extended diagonally from the front bone, and dropped down towards the ankle. Now that is the way that Dr. McCollester described it, but he put it on the

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right leg; and that is the way that Dr. Utley described it, but he put it on the left leg. Now, it is for you to say, and all I want is to call your attention to it fully, and say whether or not that could have happened. Whether or not it is possible for the injury to have been upon the right leg by that seat falling down; and whether or not that wouldn't depend upon the way that knee happened to be situated at the time that the back of the seat fell down? . . .

"The doctors disagree here somewhat in their evidence with reference to this injury. I do not mean now with reference to which leg it was on, but as to what the injury was. They call that 'diagnosis' — they like that word. I don't, — but you may. It really means undertaking to determine what the injury is; and they use it, because, when they use it, it is understood to be just that and nothing more; and, therefore, they like the old dead-language words that don't change with the use which people make of them. I do not complain about it, but I like words of the present day fully as well as I do the old. The question is whether they have been able to determine what the matter was with that woman. Was there anything the matter? Now, Dr. McCollester and Dr. West have given you their opinion as to the way that they diagnosed it — if I may use their word. Now, if I get their evidence correctly, they think that there was injury to a branch of the sciatic nerve, and that that injury was of such a nature that it has been painful and continues to be painful down to the present time. Now, Dr. Courtney, as I understand him, says that that could not be the trouble; that if that had been the trouble — if there had been a blow upon the sciatic nerve — that the limb would have wasted away, and there would have been what they call 'atrophy' in the limb, — the limb would have grown smaller, and he says that it has not; and he also says that there would have been in time some paralysis — may be he called it paresis. I won't be sure about that, — but there may have been some other effect, and that that has not taken place. Now, who is right about that? It isn't so much matter to the plaintiff what you call it. The real question with her is whether there is trouble there, whether the doctors can tell what it is, or not. She has undertaken to describe to you the pain that she has suffered

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from that. She says that that is the history of the case from that time down to this. It is for you to say whether what she says about it is true. And in considering that you may consider whether the doctors are all mistaken about it, — that is, I mean as to the cause of that pain. She says that she is suffering a pain from some kind of an injury, and the doctors can't agree as to what it is. Dr. McCollester and Dr. West think that they have got at what the trouble is; and Dr. Courtney says they have not — and I don't know but Dr. Courtney meant to have you think there wasn't any trouble — I couldn't say about that, — or that they did not describe it just right. Then there is left for you the question of whether the woman has been injured in some way so that she suffers pain; and that is the great question that you are called upon to consider. Sometimes the name of an injury or the explanation of the injury is important as to the duration of it, — as to when the woman or party would recover from it; and the name makes some difference there. But if here is an injury that this woman has suffered from, from that time down to this, and will continue to suffer in the future with reference to it, and which is due solely to the neglect of the defendant, then she is entitled to recover for it. Although Dr. West and Dr. McCollester may be wrong as to their diagnosis of it, and Dr. Courtney may have satisfied you that they were wrong, that don't help you to say what the real trouble is, or that it may be something else, and it don't make any difference what it is if it is a real injury from which she suffers. Now, as in the other parts of the case, the plaintiff has testified with reference to it, and while she may not know whether Dr. Courtney is right or whether Dr. McCollester and Dr. West are right, she may know that she has pain there, and if she has, and you believe it, then you have a right to act upon her testimony. If you don't believe it, if you say that that is all false, then you wouldn't act upon it. It is not a question of whether the doctors know what the matter is; it is a question really whether there is any trouble there which she suffers from. If you say that she was injured substantially the way she says, and that she suffers in substantially the way she says, then it is for you to say what is a reasonable compensation for that. That is all the way we have of disposing of cases of this kind. You give to the

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plaintiff such sum of money as you say is a reasonable compensation for the injury sustained."

The defendant's counsel having asked to have an exception noted to that portion of the charge which referred to the evidence as to whether the injury was to the plaintiff's right or to her left leg, so as to ascertain "whether it may not have gone into the domain of argument a little further than it ought to have," the presiding judge further charged the jury as follows:

"There is one matter, gentlemen, perhaps I didn't state distinctly enough, although I may have done so in some other cases during the term. I called your attention to the evidence with reference to whether the plaintiff could have been injured upon her right leg or whether it necessarily must have been on the left. Counsel calls my attention to the fact that he thinks that I misunderstood some of the evidence in the case. What I want to say is this: that with reference to the testimony in the case the views and suggestions of counsel as explained to you may be considered to aid you in recalling what the evidence was; but it is for you to say what the evidence was. And I have not any right to undertake to tell you that the evidence is this way or that way. I simply call your attention sometimes to the evidence to illustrate what I want you to consider, but you do not take the evidence from me. You take the evidence from the witnesses. You think it over, and if you will think it over you will be able to determine satisfactorily, I think, what the evidence was. And that is true with reference to every other part of the case. Counsel assist the jury when they recall to your mind what the witness said. But if it does not assist you to recall that that was what the evidence was, then that is of no help to you, because you must rely upon yourselves in the end. The jury under our system of trials are the sole judges of what the evidence was, and what facts were true and ought to be inferred from it. That is wholly for you. All I want to say is that you depend upon your own judgment of the testimony and not on what I say, because that may not be of any assistance to you at all."

There was a verdict for the plaintiff, and the defendant alleged exceptions.

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H. W. Dunn, (*W. A. Kneeland* with him,) for the defendant.

H. N. Allin, for the plaintiff.

BRALEY, J. If trial by jury is to retain its efficiency, the presiding judge by means of suitable instructions must enable jurors to see their way clearly to a right verdict. The provisions of R. L. c. 173, § 80, which first appeared in Gen. Sts. c. 115, § 5, that "the courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law," were not intended to destroy this salutary power. In the construction of the statute it uniformly has been held that, in charging juries, the judge, although prohibited from stating his opinion as to the credibility of witnesses, may sum up the testimony according to his recollection, submitting its effect, however, to their consideration and judgment, and leaving to them for decision all issues of fact within their province. He may elucidate the proper application of the legal principles involved by illustrations drawn from common experience, or by reference to cases where similar questions have been decided, and define the degree of weight which the law attaches to a whole class of testimony. In any clear analysis of the evidence, however impartial, the attention of the jury necessarily must be directed to the weight and importance of particular facts which they may find to have been proved. If an unbiased analytical statement of the testimony and of the law distinctly indicates the party who is entitled to prevail, this furnishes no just reason for the defeated party to complain, either of the method employed or of the adverse verdict. Besides, it is not a violation of the constitutional requirement that judges shall be "as free, impartial and independent as the lot of humanity will admit," if the instructions, while judicially fair, are comprehensively strong, rather than hesitatingly barren or ineffective, and neither the tone of a charge nor the form of verbal delivery are of themselves ground of exception, if no error of law appears. In a word, the judge who discharges the functions of his office is, under the statute as well as at common law, the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings. Instances of the exposition and practical application of the statute in accordance with these views may be found in the following cases among others,

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in which the trial court has been held not to have exceeded its judicial powers. *Durant* v. *Burt*, 98 Mass. 161, 165, 168. *Oakman* v. *Boyce*, 100 Mass. 477, 483, 486. *McKean* v. *Salem*, 148 Mass. 109. *Cobb* v. *Covenant Mutual Benefit Association*, 153 Mass. 176, 180, 181. *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444, 448. *Moseley* v. *Washburn*, 167 Mass. 345, 362. *Bishop* v. *Journal Newspaper Co.* 168 Mass. 327, 330, 331, 332. *Cook* v. *Bartlett*, 179 Mass. 576, 577, 578, 580. *Partelow* v. *Newton & Boston Street Railway*, 196 Mass. 24. See also *Commonwealth* v. *Johnson*, 188 Mass. 382, 387, and cases cited. In the present case, under the exceptions taken at the close of the charge, the defendant alleged a twofold grievance, namely, because the testimony had been incorrectly stated, and because the comment upon it was argumentative, rather than expository. The first objection has been waived by the subsequent stipulation, that the evidence had been correctly stated, and, to ascertain if the instructions are open to the second objection, the entire charge is to be considered, and not isolated portions. The plaintiff sued for personal injuries received while a passenger on a car of the defendant, and in defense it was said that her claim was a fraudulent invention to get damages. In her evidence, she described the injury as being on her right leg, while a medical witness of the defendant, from a physical examination made shortly after the accident, directly contradicted her, by locating it upon the left leg. But even then the jury could say that, if the injury was proved, the distinction of members was of little consequence. If, in his recapitulation of the testimony, the judge dwelt upon this incident at great length, he did not misquote the evidence, and it cannot be said that the illustrations used were wholly inappropriate. The real gravamen of the complaint is, that they conveyed to the jury an argument in favor of the plaintiff. But, if, standing alone, there is some ground for this criticism, as this portion of the charge should have been more cautiously expressed, upon his attention having been directed to the matter, the judge in full and unexceptional language further instructed them that not only were they to recall the evidence from having heard the witnesses, and depend upon their own judgment as to its evidentiary value, but also that what he had said by way of comment

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was only to make plain the issues, which were solely for their determination.

It is fairly manifest upon a review of the entire charge that no intentional argument was used or expression of opinion given, by which the jury should be led to infer that in the judgment of the court the plaintiff ought to prevail. *Cook* v. *Bartlett*, 179 Mass. 576, 580.

Exceptions overruled.

WILLIAM E. PARSONS *vs.* WILLIAM S. HENRY, JR., & others.

Suffolk. December 2, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Husband and Wife, Married woman's certificate. *Equity Pleading and Practice*, Exceptions to master's report, Appeal from interlocutory decree.

A married woman, having filed in 1895 a certificate in accordance with Pub. Sts. c. 147, § 11, stating her intention on her own account to enter upon the business of "importing and dealing in Castile soaps, etc.," continued that business until 1901; but, in the meantime, beginning with December, 1895, she began buying and selling wool on her own account, and, as her dealings in wool increased, her transactions in soap became of less and less importance. She filed no new certificate. An equitable attachment of certain wool which she had purchased having been made in a suit in equity against her husband, begun in 1901 for the collection of a debt alleged to be due from him to the plaintiff, a master, to whom the suit was referred, found, on evidence not reported, that she was "doing a wool business within the meaning of the statute," and found the other facts stated above; but he also found that the plaintiff had business dealings with her and knew that she was carrying on a wool business and that he was not deceived or misled by her transactions, and that in the course of such dealings he had sold to her some if not all of the wool which he was seeking to subject to attachment; and the master ruled that therefore by estoppel the plaintiff was prevented from taking advantage of the lack of a certificate and from attaching the wool as the husband's. *Held*, that the finding of the master that the married woman was doing a wool business within the contemplation of the statute could not be revised by this court, the evidence not being reported and the other findings of the master being consistent therewith; but that the mere facts that the plaintiff knew that the married woman was doing business on her own account and that he was not deceived by her doing so did not preclude the plaintiff from taking advantage of her failure to file the required certificate and from attaching as her husband's her property used in her business.

In a suit in equity certain property was attached as a husband's. A petition of the wife, in which she claimed the property as hers, and sought to be admitted as a "party claimant," was "allowed," but there was no amendment to the bill

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joining her as a defendant. The case was referred to a master, who found that the property attached was the wife's, but that it was acquired by her in a business which she was carrying on without having filed the certificate required by R. L. c. 153, § 10; that, nevertheless, because the plaintiff knew that the wife was doing business on her separate account, he was estopped from taking advantage of the lack of a certificate and from attaching the property as the husband's. The wife and the plaintiff and one of several defendants filed objections and exceptions to the report. A hearing was had before a judge of the Superior Court, and an interlocutory decree entered, reciting that the case came on for a hearing "upon the master's report and exceptions of the plaintiff and defendants thereto," and decreeing that "the exceptions of each of the parties be overruled." The plaintiff and the defendant who had filed exceptions appealed from this decree, but the "claimant" did not. Several months afterwards a final decree was entered, reciting that the case "came on to be heard . . . upon the exceptions of the plaintiff and both defendants to the master's report," and decreeing that "all said exceptions" be overruled and the master's report confirmed, but it contained no recital as to the interlocutory decree. From this decree the plaintiff, the excepting defendant and the "claimant" appealed. It did not appear that the final decree was erroneously affected by the interlocutory decree. The plaintiff did not object that the "claimant" had not appealed from the interlocutory decree and therefore had no rights under her appeal from the final decree. The "claimant" contended that the ruling of the master that she was doing a separate business was erroneous. This court, on the record, with hesitation considered the "claimant's" contention, assuming that the parties, from their attitude, treated the "claimant's" exceptions as still open as if the interlocutory decree had not been entered, and on the merits of the question overruled her exceptions.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk, December 31, 1901, between partners for an accounting as to partnership affairs, and seeking that certain wool which was alleged to have been transferred in pledge by the defendant William S. Henry, Jr., to other defendants, be applied in payment of a sum alleged to be due the plaintiff from the defendant.

Anna E. Henry filed a "petition for leave to join in said action as claimant," alleging that she was the wife of the defendant William S. Henry, Jr., that the wool in question had been purchased by her when doing business on her own account and was hers and not her husband's. The petition was "allowed," but no amendment to the bill was made.

The case was referred to a master. The following findings in his report are material: Anna E. Henry at the suggestion of her husband, William E. Henry, Jr., in 1891 began importing and selling Castile soap on her own account, her husband attending to the buying, importing and selling, while she personally kept the books and received all the profits. The place of busi-

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ness was in Boston. The business was profitable and continued through 1901. In 1895 she filed with the city clerk in Boston a certificate in accordance with Pub. Sts. c. 147, § 11, stating that she proposed to do business on her own account under the style of Henry and Company at 158 Federal Street, Boston, and that the nature of the business was "importing and dealing in Castile soaps, etc." Her husband's place of business was 158 Federal Street, Boston.

On December 5, 1895, four months before the formation of either of the partnerships as to which the plaintiff's bill relates, Anna E. Henry, at the suggestion of her husband, began buying and selling wool on her own account. As her dealings in wool increased, her soap business became of less and less importance. She kept her own books of account showing her various business transactions, but, outside of keeping the books, her husband conducted the business. The fact that she, as Henry and Company, was making purchases and sales of wool was well known to the plaintiff and to his brother, another member of the partnership and a defendant in this suit. Henry and Company as such had no place of business and no sign. Mrs. Henry used printed letter and bill heads which indicated only that Henry and Company dealt in Castile soap.

On January 8, 1902, after the equitable attachments were made in this suit, Mrs. Henry filed a certificate in the office of the clerk of the city of Boston in accordance with R. L. c. 153, § 10, stating that she proposed to do business on her own account as an importer of and dealer in Castile soap, oils and wools, under the name of Henry and Company at 186 Summer Street, Boston.

The report continued: "The claimant contends first that she was not doing a wool business within the meaning of R. L. c. 153, § 10, and, second, that, if she was doing a wool business within the meaning of the statute, the plaintiff is estopped by reason of his knowledge of her transactions and his business dealings with her from taking advantage of the statute.

"As to her first contention, I find that she was doing a wool business within the meaning of the statute.

"Her second contention presents a question of law to be determined in connection with the facts found as above stated. . . .

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Both Charles C. and William E. Parsons [a brother of the plaintiff and the plaintiff, who were partners] knew the fact that Mrs. Henry was doing business on her own account; they were not deceived or misled by what she had done or was doing; they were partners of her husband and knew what recourses he employed in the business in which they were jointly interested and as a result of which their claims against him arise; they not only did not object to her transactions in wool, but borrowed money from her on various occasions and paid it back to her, and finally they sold or had transferred to her most if not all of the very wool which they now seek to hold as the property of her husband. I rule therefore in accordance with the claimant's second contention that the plaintiffs are estopped in equity, by reason of the facts above stated, from taking advantage of the statute."

The master also found, on the accounting, that a certain sum of money was due to the plaintiff from the defendant William S. Henry, Jr.

The claimant, Anna E. Henry, filed objections and exceptions to the findings of the master that at the times stated in the report she was engaged "in the wool business or in any business requiring her to file a married woman's certificate under the statutes," and to the finding "that the property owned by her was subject to attachment by her husband's creditors save and except for the other facts found by" the master "relieving said property from said attachment." The plaintiff filed an objection and exception to the report "because on the facts found and stated the master ruled that" the plaintiff "was estopped in equity from taking advantage of R. L. c. 153, § 10." The defendant Charles C. Parsons also filed an objection and exception substantially the same as that of the plaintiff.

The case was heard upon the master's report and exceptions thereto before *Fessenden*, J., and on August 3, 1906, an interlocutory decree was entered as follows: "This cause came on to be heard at this sitting upon the master's report and the exceptions of the plaintiff and the defendants thereto and was argued by counsel and thereupon it is ordered and decreed that the exceptions of each of the parties be and hereby are overruled." From this decree the plaintiff and the defendant Charles C. Parsons appealed. On January 16, 1907, a final

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decree was entered, which read "This cause came on to be heard . . . upon the exceptions of the plaintiff and both defendants to the master's report, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed, (1) that all said exceptions be, and hereby are, overruled; (2) that the master's report be, and hereby is, confirmed." From this decree the claimant filed the following appeal: "And now comes Anna E. Henry, claimant in the above entitled cause, and appeals from the first and second paragraphs of the final decree entered herein, in so far as said paragraph 1 overrules her exceptions to that part of the master's report which finds that she was doing a wool business within the meaning of R. L. c. 153, § 10, and in so far as said paragraph 2 confirms that said portion of the master's report which finds that she was doing a wool business within the meaning of R. L. c. 153, § 10, and the appellant says that she was not doing a wool business within the meaning of said statute, and prays that this her appeal may be allowed." The plaintiff and the defendant Charles C. Parsons also appealed from the final decree.

W. B. French, (*R. M. Morse & E. L. Curtiss* with him,) for the plaintiff.

S. J. Elder, (*F. E. Bradbury* with him,) for the "claimant" Anna E. Henry.

C. W. Bartlett & E. R. Anderson, for the defendant Charles C. Parsons, did not care to be heard.

BRALEY, J. By the common law, because of the union in person of husband and wife, personal property acquired by a married woman during coverture could be levied upon by the creditors of the husband in satisfaction of his debts. *Morse* v. *Toppan*, 3 Gray, 411. *Gerry* v. *Gerry*, 11 Gray, 381. *Nolin* v. *Pearson*, 191 Mass. 283, 284. But this was modified by Sts. 1855, c. 304, § 7, and 1857, c. 249, §§ 1, 2, which conferred upon her the right to carry on any trade or business on her sole account. The earnings or profits derived therefrom not only became her separate property, with the power of disposal free from her husband's interference or control, but could not be taken in satisfaction of his debts. *Lord* v. *Parker*, 3 Allen, 127, 129. *Forbes* v. *Tuckerman*, 115 Mass. 115. *Chase* v. *Phillips*, 153 Mass. 17, 20. But, while no conditions at first were attached

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to the exercise of these rights, it often happened that husband and wife equally appeared to be in the possession and use of the property, as well as of the business. To remove this uncertainty for the benefit of creditors, who, if they contracted with the husband, could not hold the wife, or, if they contracted with her, could not collect their debts from him, but, if put in possession of information as to the title, could regulate their mercantile transactions accordingly, St. 1862, c. 198, was enacted. *Chapman* v. *Briggs*, 11 Allen, 546. *Allen* v. *Clark*, 190 Mass. 556, 559. In § 1 it provided that if a married woman, then or thereafter doing business on her own account, neglected to file a certificate in the clerk's office of the city or town where such business was carried on, stating the name of her husband, the nature of the business, and its location when practicable, her husband's creditors might attach the property or take it on execution. By re-enactment, this statute has been continued as a part of our statutory law relating to the personal and property rights of married women when engaged in trade, and it was in force when the equitable attachment of the funds standing in the name of the claimant was made. St. 1881, c. 64, §§ 1, 3. Pub. Sts. c. 147, § 11. R. L. c. 153, § 10.

It is conceded that there was a failure to comply with this requirement. But, while insisting upon her exception that upon the facts reported the master erroneously found she was engaged in business, the protection of the statute is invoked; as he correctly ruled, if the finding stands, that because he knew of the source from which her title to the funds was derived, the plaintiff is estopped from asserting the rights of an attaching creditor. The master decided upon evidence not reported, that, while supervising her household affairs, at first she became interested in the importation and sale of soap, under a certificate duly recorded, and then, without such certificate, dealt in the purchase and sale of wool for a period of nearly five years, making large aggregate profits. But, although employed in other pursuits, she still would be engaged in business when dealing in wool, even if her entire time was not required in the management of this part of her commercial affairs. If a single purchase or sale cannot be considered anything more than a transient transaction, her continuous trading, with the making of bank deposits and

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the keeping of books of account, warranted the conclusion of the master that she was conducting an established business as contemplated by the statute. *Desmond* v. *Young*, 178 Mass. 90, and cases cited.

But the ruling to which the plaintiff excepted, that, because of his knowledge that the claimant traded on her sole account, in equity he would be estopped from taking advantage of this neglect even if no certificate had been recorded, cannot be supported. It is the purpose of the statute that the attaching creditor, either at law or in equity, shall be barred only by the recorded certificate. *Chapin* v. *Kingsbury*, 135 Mass. 580; *S. C.* 138 Mass. 194. The amendatory act changed an absolute to a qualified right by requiring a certificate as a precedent condition, if her property, either when used or when acquired in trade on her separate account, was to be exempt from seizure by her husband's creditors. Through a voluntary failure to avail herself of this condition, the proceeds of the business as between herself and them remained his property as at common law. The correlative provision found in § 2, now R. L. c. 153, § 10, that in the absence of a certificate, which he may make and record if she does not, the husband shall be liable for all contracts lawfully made in the business, originated with the statute. But, if by this section the creditor who contracts with the wife has been given a remedy against the husband, there is no express or implied modification of the general rule, which, apart from our statutes enlarging the rights of married women, subjects her personal property to the payment of his debts. If she had been induced by the intentional misrepresentations of the plaintiff or his firm to refrain from making known her independent ownership by the statutory record, he might be precluded from taking advantage of this omission. But no equitable estoppel is created which prevents the plaintiff from asserting a lawful right, where, merely from personal knowledge or through the information of his partners by which he would be bound, he must be held to have known that in fact the property employed, as well as the business itself, belonged to her. *Nourse* v. *Nourse*, 116 Mass. 101. It follows that the plaintiff's exception to the master's report and appeal must be sustained, and the exception of the claimant overruled.

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There has been some embarrassment in the consideration of the claimant's exception and appeal arising from the confused character of the record. In the original bill she was not made a party, nor, after her petition to intervene as claimant of the property attached had been allowed, was any amendment made praying for relief as against her. The contest as between her and the plaintiff consequently was limited to this question. By the interlocutory decree, the exceptions of the parties were overruled, but, while the others appealed, she did not, and, having taken no appeal, the master's report, so far as it was adverse to her, could not be revised. *Hillier* v. *Farrell*, 185 Mass. 434, 435. After the entry of this decree, more than a year elapsed when, after argument, a final decree was entered, again overruling the exceptions, from which they severally appealed. But at that time, as the record stood, there were no exceptions pending upon which the final decree could operate. If the final decree had been erroneously affected by the interlocutory decree, her rights would still have been saved, but, having been properly entered as to her, she is not aided by R. L. c. 159, § 26. *Cawley* v. *Jean*, 189 Mass. 220. It may be inferred, however, with some hesitation, that, as no objection has been made before us, the court with their consent, but without any formal recognition by way of recital of either the agreement or its previous decree, treated the exceptions of the parties as still pending, and proceeded as if the interlocutory decree had not been entered.

The final decree of the Superior Court must be modified by directing that the balance of the proceeds from the sale of the wool shall be paid to the plaintiff, but in all other respects it is affirmed.

Ordered accordingly.

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MARY SULLIVAN *vs.* OLD COLONY STREET RAILWAY COMPANY.

Norfolk. December 5, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Damages, Mental suffering.

The mental suffering for which damages can be recovered in an action for personal injuries is limited to that which results to the person injured as the necessary or natural consequence of the physical injury.

In an action by a married woman for personal injuries, resulting in an extremely nervous condition on her part which might cause the premature birth of a child, she cannot recover damages for her mental suffering on account of the death of a child who was conceived by her seven months after her injuries and was born prematurely seven months later.

TORT by a married woman for personal injuries sustained on the evening of April 17, 1905, when the plaintiff was a passenger on a car of the defendant, from the car leaving the track and coming in collision with a post upon the edge of a sidewalk of High Street in Dedham. Writ dated May 8, 1905.

At the trial in the Superior Court before *Crosby*, J., the defendant admitted its liability, and the evidence related solely to the question of damages.

The plaintiff's attending physician testified that the physical examination on the day following the accident showed, so far as he could recall, but a single bruise, which was over her right lower ribs and was about the size of a silver dollar; and that she was at the time of the trial and had been since the accident suffering from no organic trouble, but from a functional disturbance of the nervous system, commonly known as hysteria, and that it came on principally as a result of the excitement and fright of the accident, which would be an adequate cause of her condition, though the blows and "all those things" came in as contributing causes. It further appeared that about November 1, 1905, she became pregnant, and that on July 5, 1906, she gave birth to a child.

As to this pregnancy and birth the attending physician testified as follows:

"In or about November of that year she became pregnant, and after that there was a good deal of exaggerated nausea

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which lasted some weeks. That, however, disappeared and her period of pregnancy was fairly comfortable so far as that was concerned, except that her old symptoms of backache and headache and sleeplessness existed. . . . On July 5, she gave birth to a child which lived just short of forty-eight hours, and then had three or four convulsions and died. After that, she was in bed for a period of about two weeks — perhaps a little less — and then she got up and about and from that time she made a steady improvement. . . . We commonly suppose that the condition of the mother while carrying the child affects the health and likelihood of life of the child to a certain extent, and yet we can never be sure of our results. I could only surmise whether the condition of the mother's health had any effect on the child or not. There is no rule to go by. It is perfectly possible that an apparently healthy mother will give birth to a dead, diseased, or deformed child, and a slight sickly mother will give birth to a well child. It depends upon a great variety of things which you cannot tell much about. It is possible that the mother's pregnancy occurred during the month before October 30. . . . I do not know the cause of the child's death except that I thought it was premature, and I know it died of convulsions." A physician, called by the defendant, testified on his cross-examination that "premature birth might result from a nervously disturbed condition of the mother if such condition affected the mother profoundly."

At the close of the evidence, the defendant asked the judge to instruct the jury, among other things, as follows:

1. The jury should take great care not to allow the plaintiff any damages by reason of the death of the child. Such injury, even if there were any evidence that it was indirectly attributable to the accident, is too remote to be a ground for damages in these cases.

2. There is no sufficient evidence that the fact that the child did not live was in any way attributable to the accident.

The presiding judge refused to give the second instruction requested. He did, however, give the first instruction requested, but also charged the jury upon this branch of the case as follows:

"There is a difference in the claim made by the plaintiff and that of the defendant as to whether the birth of this child and

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its subsequent death was in any way or manner attributable to this injury which Mrs. Sullivan sustained, and I instruct you that on account of the death of this child the plaintiff is not entitled to recover, that that is not a proper element of damage to be considered by you in the trial of this case and in estimating this plaintiff's damages, and you will bear that carefully in mind . . . for the death of this child whether its death was due to this accident, as the result of this accident or not, that is a matter that you are not to consider but should leave entirely out of consideration in your estimate of damages. On the other hand, gentlemen, it is a question in dispute between the parties as to whether this child's birth and death was in any way affected by the injuries which Mrs. Sullivan received on April 7, 1905. If you should find as a matter of fact that the accident had nothing to do with the birth of the child at the time it was born and its subsequent death, why then any question on what I am about to say about it is entirely immaterial. If, on the other hand, you should find that this child . . . the child's birth, the date of its birth, the day of its birth and its subsequent death was affected by reason of the injuries which Mrs. Sullivan received while she was a passenger in the car of the defendant as she claims, then that evidence would be important for your consideration in one particular only — not that she would be entitled to recover for the death of the child, but if you found that the child's death was brought about on account of the injuries which the mother received, and you should further find that on account of the death of the child that the mother suffered mentally as the result of the death of the child, then you would be entitled — it would be your duty to take into account that mental suffering, if there was any, in connection with the damages which she has sustained. If she does not satisfy you that this child's death was attributable to the accident, or if you should find that she did not suffer mentally as the result of this child's death, then you would leave out of consideration that question in passing upon the question of damages."

The jury returned a verdict for the plaintiff in the sum of $2,100; and the defendant alleged exceptions.

Asa P. French, (*J. S. Allen, Jr.*, with him,) for the defendant.

E. Greenhood, for the plaintiff.

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RUGG, J. The connection between the tortious act of a person sought to be charged for the consequences of an injury, as the cause, and the injury sustained, as the effect, must be established by a fair preponderance of the evidence before a plaintiff can be permitted to recover. Such causal connection cannot be left to conjecture, surmise or speculation, but must rest upon a firm foundation of proof. *Williams* v. *Citizens Electric Street Railway*, 184 Mass. 437. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 211, 219. The evidence tending to connect the premature birth of the child, on July 5, 1906, and its subsequent death within forty-eight hours, with the injury received by the plaintiff on April 7, 1905, is extremely slender. If there were nothing beyond the testimony of the plaintiff and her attending physician, it would be insufficient, for the latter plainly said that he could only "surmise" as to the cause of the condition of the child. There was, however, testimony showing an extreme nervous condition on the part of the plaintiff as the result of the injury, and a physician called by the defendant testified that premature birth might result from a nervous condition of the mother, if she were profoundly affected by it. Upon the authority of *Sullivan* v. *Boston Elevated Railway*, 185 Mass. 602, this was enough. It has been argued, nevertheless, that the case rests on the ground stated in *Daniels* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 393, namely, that the wrongful act of the defendant was not "the active efficient cause of the subsequent event," but "only the producer of the conditions which opened the door to another cause, which directly and actively produced the result," and that the death of the after conceived child was a remote consequence of the injury to the mother, but not an effect actively produced by it, and that the plaintiff's voluntary act intervened as the real cause. See *Snow* v. *New York, New Haven, & Hartford Railroad*, 185 Mass. 321. This principle has no application to a case like the present. The perpetuation of the human race cannot be termed a voluntary act, but it rests upon instincts and desires, which are fundamentally imperative.

Although careful instructions were given to exclude the death of the child as an element of damage, the jury were permitted to take into account the mental suffering of the mother on this

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account. She was thus permitted to recover money compensation for the sorrow and anguish endured as a result of the contemplation of the death of her child conceived nearly seven months and born fourteen months after the injury. This is extending the rule of damages beyond any limits heretofore recognized. It is an expansion which finds no support in any principle of law. Mental suffering connected with and growing out of physical injury is a legitimate element to be considered in determining damages against a person wrongfully causing an injury. Such suffering is to a greater or less extent inseparably connected with physical harm, and flows from it as a natural result. *Canning* v. *Williamstown*, 1 Cush. 451. The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another. Recurrence to this fundamental conception tests the soundness of claims for the inclusion of new elements of damage. The landowner, whose home, rendered dear by ties of ancestry and personal attachment, is seized under the power of eminent domain, has a right to receive no larger sum, on account of the mental distress he endures in leaving it, than a mere stranger, holding it purely for speculative purposes. The parent, who sues for the loss of services of his minor child, cannot recover for his own sympathetic sorrow in witnessing the sufferings, which cause his loss of service. In an action for deprivation of consortium, the anguish of mind of the husband, in observing the bodily pain of a sensitive wife, forms no element in the damages he may recover. These considerations apply peculiarly to a case like the present. Wealth brings no consolation to those who mourn. The grief occasioned by the death of loved ones touches chords in the human soul which lie outside the compass of pecuniary relief. The solace, which stills the voice of lamentation, comes from sources which cannot be found through the medium of money. The mental suffering, for which damages can be recovered, therefore, is limited to that which results to the person injured as the necessary or natural consequence of the physical injury. But sentiments of grief, sorrow and mourning, which are aroused by extraneous causes, thoughts or reflections, are excluded. The

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contemplation of the suffering and death of a child, begotten long after the event complained of, is too remote from the original physical injury to the parent and too intangible and ethereal to be connected with the original wrong of the defendant as a result to be reasonably apprehended from such a cause. The law cannot enter the realm of pure sentiment in this class of case, and award pecuniary compensation for those injured feelings which spring from sympathy and the severance of ties of love and affection. It follows that there can be no recovery for the mental suffering which ensues from the contemplation of the pain, deformity, imperfections or characteristics of any other person or thing. See *McDermott* v. *Severe*, 202 U. S. 600.

The extent to which recovery may be had for mental suffering has been the subject of somewhat conflicting decisions in various jurisdictions. But so far as we have been able to discover, there is unanimity of decision that, for mental suffering of a class like that under discussion, (except by express provision of statute, see *Kelley* v. *Ohio River Railroad*, 58 W. Va. 216,) there can be no recovery. *Maynard* v. *Oregon Railroad*, 46 Ore. 15. *Bovee* v. *Danville*, 53 Vt. 183. *Western Union Telegraph Co.* v. *Cooper*, 71 Texas, 507. *Texas Mexican Railway* v. *Douglass*, 69 Texas, 694. *Atchison, Topeka & Santa Fe Railroad* v. *Chance*, 57 Kans. 40. *Butler* v. *Manhattan Railway*, 143 N. Y. 417. *Lennox* v. *Interurban Street Railway*, 104 App. Div. (N. Y.) 110.

Exceptions sustained.

BENEDICT BENSON *vs.* FRANK E. HALL.

Norfolk. December 6, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Evidence, Admissions and confessions. *Practice, Civil*, New trial, Death of judge.

In an action of contract for a balance alleged to be due for remodelling a barn into a dwelling house, where two sets of specifications have been put in evidence, one by the plaintiff and the other by the defendant, each contending that his set and not the other was the foundation of the contract between the parties, the plaintiff may show that the defendant took the set of specifications put in evidence by the plaintiff to a co-operative bank for the purpose of pro-

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curing a mortgage, this being evidence of an admission by conduct on the part of the defendant.

If the judge who presided at a trial dies after a motion for a new trial has been filed but before it has been passed upon by him, the motion for a new trial is not to be granted as a matter of right by reason of the death of the judge before whom the case was tried, but, on the contrary, another judge of the same court at a hearing on the motion has the same discretionary power to grant or deny it that the deceased judge had.

BRALEY, J. This is an action of contract to recover a balance alleged to be due for remodelling a barn into a dwelling house. The declaration contains two counts, one upon the contract, and the other upon an account annexed, while the answer was a general denial. At the trial in the Superior Court, before the late Mr. Justice Maynard and a jury, there was evidence that the work was performed in compliance with a set of specifications, which had been signed by the defendant, but not by the plaintiff. It was contended by the defendant, that although he had signed, yet his signature was intended only as an assent for the convenience of the plaintiff, to enable him to purchase lumber. He then introduced another set of specifications, under which it was contended the work should have been done, accompanied by testimony that the plaintiff agreed to perform the work as required by this set. In support of his contention that the first set should control, the plaintiff then was permitted, subject to exception, to show that the defendant had taken this set to a co-operative bank for the purpose of raising a mortgage. But there is nothing in this exception, as it was plainly competent for either party to put in evidence the admissions by conduct of the other relating to the different sets, as forming a part of the testimony, upon which the jury were to decide between these conflicting contentions. The jury having returned a verdict for the plaintiff, the defendant filed a motion for a new trial, during the pendency of which the presiding judge died, and it came on to be heard before the Chief Justice, by whom it was denied. At the hearing, the defendant asked the Chief Justice to rule, that the verdict should be set aside and a new trial ordered, because of the death of the judge before whom the case had been tried. The refusal to give this ruling, presents the question raised by the second exception. It is the defendant's argument, that

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only the judge who presided could act, and that his decease operated as an allowance of the motion. But while the defendant had asked for a review of the trial, and the judge to whom he applied was prevented by death from taking judicial action, the tribunal of which he was a member survived. The discretionary power of the court had been invoked, and if the great advantage which the parties would have derived from being heard by the judge who presided at the trial had been irretrievably lost, yet the defendant did not withdraw his motion, and, until it had been disposed of, the plaintiff could not obtain judgment. In this situation it was open to either party to make application for a hearing to the court whose members severally were clothed with the same powers, and who possessed the absolute right to hear and determine all matters which remained undecided in the case. It was, therefore, within their discretion, as it had been in his, either to grant or to refuse a second trial. *Wamesit Power Co.* v. *Lowell & Andover Railroad*, 130 Mass. 455, 457. *People* v. *McConnell*, 155 Ill. 192. *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 303.

Exceptions overruled.

E. J. Parker, for the defendant.

J. D. Mackey, for the plaintiff, was not called upon.

WALTER T. WHIPPEN *vs.* EDWARD A. STONE & another.
WILLIAM A. WHIPPEN *vs.* SAME.

Suffolk. December 6, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Voluntarily incurring danger.

In an action by a boy against his employer for personal injuries from having his hand crushed between the moving platen and the die of a power press used for cutting out cardboard for boxes, which he was operating, it appeared that the plaintiff had had an experience of nearly four years in the use of such a machine, that it was his duty to feed in the sheets of cardboard, taking out the completed form as the platen moved back from the die and placing a fresh sheet in position, that this was done once every three seconds, that the machine could be stopped

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whenever the operator wished by shifting a belt and applying a brake, that on the occasion of the accident a piece of cardboard had got into a place in the machine where it ought not to be, when the plaintiff, without attempting to stop the machine either wholly or partially, which he said in his testimony could have been done easily, attempted to remove the piece of cardboard while the machine was running at full speed, saying in his testimony that there was no need of stopping the machine. *Held*, that the plaintiff could not recover, as his injury was the result of his exposing himself unnecessarily to an obvious danger, and that the fact, that he thought there was time to make the experiment safely, or possibly to repeat what he had done before without harm, did not relieve him from the consequences of voluntarily incurring the obvious peril.

TWO ACTIONS OF TORT, the first by a minor against his employers for personal injuries incurred in the manner described in the opinion, and the second by the father of the plaintiff in the first case for loss of his services and for the expenses of medical attendance and nursing caused by his injuries. Writs dated December 14, 1901.

In the Superior Court the cases were tried together before *White*, J., who at the close of the plaintiffs' evidence ordered a verdict for the defendants in each of the cases. The plaintiffs alleged exceptions.

H. H. Bond, for the plaintiffs.

R. Spring, for the defendants.

BRALEY, J. The infant plaintiff when at work upon a power press creasing and cutting out cardboard for boxes was so severely injured that amputation of his right hand became necessary. But while the misfortune is deplorable, if his conduct contributed to the injury, the defendant is not responsible. In operating the press the cardboard was set upon a platen, which once in three seconds received, carried and pressed the sheet against a rigid die faced with brass rules and steel knives, where it was creased and cut into the required shape. Between revolutions, it was the plaintiff's duty to feed in the sheets by taking out the completed form, and as the platen moved back from the die, then to place a fresh sheet in position. If the operator desired to stop the press, he could shift the driving belt to a loose pulley, and then apply a brake underneath the fly wheel, worked by a treadle, which upon being pressed down, not only by friction upon the wheel brought the machine to a rest, but prevented the platen, although approaching very closely, from reaching the die. During its operation, a sheet having

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partially stuck on the die, he pushed it off the platen with the lever. It then turned half over, and adhered to one of the gauges, when the plaintiff reached down with his arm between the die and the moving platen, where he suffered the injury of which he complains. It appears from his testimony, that he not only was acquainted with the speed, equipment and mechanical operation of the press, but was familiar with the running of similar presses, gained by an experience in their use of nearly four years. Instead of either wholly or partially stopping the press by shifting the belt and applying the brake, which he said could have been easily done, and then taking off the cardboard, he chose to attempt its removal while it was running at full speed. It is plain that the plaintiff deemed it unnecessary to take this precaution, for he testified "there was no need of doing this," and voluntarily chose to use the method described. The danger that his hand might come in contact with the platen, and be forced against the die, was as open and apparent as the meeting of the two, when cardboard was being used. That he thought there was time to make the experiment safely, or possibly to repeat what he had done before without harm, does not relieve him from the consequences of his failure to avoid the obvious peril of his arm and hand coming into contact with the working machinery. *Crowley* v. *Pacific Mills*, 148 Mass. 228. If upon realizing the danger, he not only threw the shipper, but tried the brake, which he contends failed to work properly or it would have stopped the press in time to have prevented the accident, his own carelessness renders it unnecessary to consider whether there was evidence of the defendant's negligence. *Pratt* v. *Prouty*, 153 Mass. 333.

Exceptions overruled.

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FRANK A. GORHAM & another, executors, *vs.* CHARLES H. MOOR.

Suffolk. December 9, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Will, Soundness of mind, Undue influence. *Evidence*, Opinion: experts, Admissions and confessions. *Witness*, Contradiction and impeachment. *Practice*, *Civil*, New trial.

On the issue of the soundness of mind of a testatrix, witnesses other than the attesting witnesses of the will and the family physician of the testatrix, who are neither alienists nor physicians but who knew the testatrix intimately for a considerable period of time extending sufficiently near to the time of the execution of the will to make their observation of facts competent, may be asked by the executor, expecting a negative answer, whether they ever saw the testatrix do or heard her say anything that indicated anything singular or unusual respecting her mental condition.

Upon the trial of the issue of undue influence in proving a will, a declaration by the person charged with having procured the execution of the will by undue influence, that he did exercise such influence, is not evidence of that fact as against other parties in interest.

It is proper to exclude evidence of a previous declaration of a witness, which is offered to contradict his testimony, if the testimony sought to be contradicted has been corrected by the witness himself in his later testimony, so that the declaration offered is not in contradiction of his corrected testimony.

To impeach the credibility of a witness, evidence is admissible of a previous declaration made by him which contradicts his testimony in any material matter.

Upon the trial of the issue of undue influence in proving the will of a testatrix, if the person charged with having procured the execution of the will by undue influence has testified that he never advised or talked with the testatrix about her will or had anything to do with the making of it, it may be shown, for the purpose of impeaching his credibility as a witness, that at another time and place he made a statement that the will was as he told the testatrix to make it.

Where in the trial of issues framed for a jury in proving a will, there has been error in the exclusion of evidence which should have been admitted in the trial of the issue of undue influence, but the other issues have been tried without error, a new trial will be granted upon the issue of undue influence only, and the verdict of the jury on the other issues will stand.

RUGG, J. These exceptions relate to a trial of issues as to undue influence and soundness of mind of Mary Ann Gowen in the execution of her last will.

1. Several witnesses other than the attesting witnesses of the will and the testatrix's family physician were asked, in substance, the question whether they ever saw the testatrix do or heard her say anything that indicated anything singular or

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unusual respecting her mental condition.* None of these witnesses were alienists or physicians, but they all had an intimacy with the testatrix for a considerable time, and covering a period sufficiently near to the date when the will was executed to make competent their observations of facts. It was early established as the law of this Commonwealth that witnesses not experts are not permitted to give their opinion in regard to the sanity of one whose mental condition is drawn in question. Exceptions, not material in this inquiry, are made in the trial of will cases as to the subscribing witness and the family physician of the testatrix. This court, although repeatedly asked, has always refused to change this rule, and it is not now open to discussion. *McCoy* v. *Jordan*, 184 Mass. 575. The difficulty in its application lies in keeping distinct the line between statements of facts, from which the jury can draw an inference as to the mental capacity of the person under inquiry, and an expression of opinion as to what the facts show. Many statements of fact involve to a greater or less extent an exercise of judgment, and

* The questions referred to were put by the counsel for the executors and were admitted by the presiding justice against the exception of the contestant. All of them were answered in the negative. The questions were as follows: "Did you observe any fact about her conversation that indicated anything singular or unusual respecting her mental condition?" "Did you notice anything that indicated a failing of her mind after the shock up to the time of her death?" "Did you ever hear her say anything or see her do anything that indicated any failure of her memory?" "Did you ever notice anything about her condition that indicated anything singular or unusual respecting her mental condition?" "Did you ever see her do anything or say anything that indicated to you in any way that her mind was affected or weakened?" "Did you ever see her do anything or hear her say anything that indicated to you that her mind was weakening or failing?" "Did you ever notice anything in her conversation that indicated to you any weakness of the mind?" "Did you, during the whole time of your acquaintance with her, ever hear her say anything or see her do anything that indicated that her mind was affected or weakened?"

"In addition to the general objection, objection was specially made that the several questions were in no way admissible unless they were to be followed up by facts or circumstances, and the witnesses cautioned that they were not to express an opinion or the jury informed that it was not to be given weight as an opinion. This was not done, the presiding justice deeming it unnecessary." The executors did not contend that the questions were in any way preliminary, and except in case of four of the witnesses they did not go further.

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they generally require observation and attention. Frequently a deduction from certain facts must be made in order to determine the fact directly in issue. To decide whether one is intoxicated or not, when nicely analyzed, demands an observation of certain facts or conditions, and an inference as to the cause of these manifestations. But the result is not a matter of opinion; it is a statement of fact. *Edwards* v. *Worcester*, 172 Mass. 104. The precise form of question, which is aimed to elicit a fact as distinguished from that which calls for an opinion, has frequently been considered. All the previous cases are cited, discussed and classified in *Clark* v. *Clark*, 168 Mass. 523, decided in 1897. Since that time question has arisen, in *Hogan* v. *Roche*, 179 Mass. 510, where it was held that an inquiry as to whether the witness had observed in the testatrix "any peculiarity of manner, speech or conduct" was admissible; in *Ratigan* v. *Judge*, 181 Mass. 572, the question "Was he subject to delusions or hallucinations?" was held to be incompetent, as requiring an opinion as to mental condition; and in *McCoy* v. *Jordan*, 184 Mass. 575, where the subject was again elaborately discussed, it was there held that the following questions were competent: "Did you ever notice anything to indicate that he was not of sound mind?" "Whether or not you noticed any failure of intelligence on his [the testator's] part?" "What facts did you observe as to his [the testator's] powers of comprehension, mental grasp, coherency, power of reasoning, memory, intelligence, will and accuracy?" It was further said in the course of the opinion, page 578, "A witness may properly be asked if he has observed any facts that have relation to the subject upon which information is sought. Such a question can usually be answered by 'yes' or 'no.' If he answers in the affirmative, he may be asked to state what he has observed. If the purpose is to prove a negative, the question may be so framed as to direct the attention of the witness to his observation as to peculiarities of speech or manner of conduct, or anything else indicating an unusual mental condition." The questions objected to by the contestant in the present case appear to have been framed in view of this last statement of the law, and were therefore not open to objection. See also *Stone* v. *Stone*, 191 Mass. 371, 376.

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2. One issue was whether the testatrix was unduly influenced by one Gorham. He was called as a witness, and testified that he never advised or talked with the testatrix about the will, or in any way had anything to do with the making of it. On cross-examination he testified, on one day, that he did not see the will nor have any intimation of its contents, so far as he remembered, until the will was offered for probate, which was seven days after the death of the testatrix. On the following day, however, he modified this statement and testified that he read a copy of the will at the office of the attorney who drafted it on the day after her death. He was also asked on cross-examination whether, at a conversation with a Mrs. Cousin on the day after the death of the testatrix, he did not say to her that the will was short and to the point as he told her [the testatrix] to make it, and to this question he answered no. Thereafter, the contestant called Mrs. Cousin, and asked of her what Mr. Gorham said in regard to the will, for the purpose of contradicting both his denial of having said that the will was short and to the point as he told her to make it, and also his statement that he had no knowledge of the contents, offering upon the latter point to show that he had informed the witness as to the nature of the will and certain provisions in it at a time when, according to his testimony as given on the first day he was on the witness stand, he could not have obtained any knowledge about it after the testatrix's death.

The inquiry of the witness Gorham as to whether he had not said the will "was short and to the point as he told her to make it" was irrelevant if calling for affirmative evidence. A declaration by one, charged with having procured by undue influence the execution of a will, that he did exercise such influence is not evidence of the fact as against other parties in interest. The rights of innocent devisees and legatees cannot be thus affected. "Such a rule would violate all sense of right." *Shailer* v. *Bumstead*, 99 Mass. 112, 128. It would not be competent for a party in cross-examination to draw out such irrelevant testimony, and thereafter undertake to impeach the witness by showing that he had made inconsistent or conflicting statements at other times. *Force* v. *Martin*, 122 Mass. 5. *Parker* v. *Dudley*, 118 Mass. 602. *Commonwealth* v. *Matthews*, 129 Mass.

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485. *Commonwealth* v. *Fitzgerald*, 2 Allen, 297. *Mowry* v. *Smith*, 9 Allen, 67. Although the second branch of the offer tended to contradict the testimony of Gorham as given on the first day, yet as he finally left it on the second day of his examination, by having said that he read a copy of the will during the day after the death of the testatrix at the office of the attorney, it did not have a tendency to contradict him to show that on the evening of the day on which, as he testified, he had seen the will, he made statements as to its contents to Mrs. Cousin. It was open to the contestant to argue as to the inconsistencies of the witness's testimony and the fallibility of his memory, but not to contradict a statement made early in the examination, which the witness himself corrected before the conclusion of his testimony. These were the grounds upon which the testimony was chiefly offered at the trial; but, during the discussion, it was said by one of the counsel for the contestant: "We offer it not because it is material to the case, but because it bears on Mr. Gorham's credibility." This was a general offer, and enables the contestant now to sustain his exception, if he shows that it contradicted any material evidence given by the witness Gorham. The latter had testified generally that he never advised or talked with the testatrix about her will, or had anything to do with the making of it. A statement made by him at another time and place that the will was "as he told her to make it" tended to contradict him upon this portion of his material testimony, and was therefore admissible. We cannot say that the contestant may not have suffered harm by the exclusion of this evidence. His exception on this point must be sustained. As two distinct issues were passed upon by the jury, and the point upon which the exceptions must be sustained relates solely to the issue of undue influence, the new trial is to be confined to that issue, and the verdict of the jury upon the issue as to the soundness of mind of the testatrix and any other, which may have been submitted to them, is to stand.

So ordered.

A. S. Littlefield, (of Maine,) (*L. G. Roberts* with him,) for the contestant.

F. N. Nay, (*J. L. Bates & F. A. Appleton* with him,) for the executors.

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JOSEPH WAKEFIELD *vs.* BOSTON COAL COMPANY.

Suffolk. December 10, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence. Agency. Master and Servant.

A traveller on a crowded sidewalk of a city street is not necessarily negligent in stepping into an open coal hole, although he sees a coal team backed up toward the building to which the coal hole belongs and a man shovelling scattered coal out of the gutter.

It is the duty of a coal dealer who uses a coal hole in a sidewalk in delivering coal to a customer, to use proper precautions to protect pedestrians from personal injury, and he is not relieved from the performance of this duty because of a corresponding duty on the part of his customer who maintains the coal hole.

A teamster employed by a coal dealer, who is sent to deliver coal and on asking where to deliver it is told by the purchaser to put it in a coal hole in the sidewalk, in using the coal hole after this direction is none the less acting within the scope of his employment as a servant of the coal dealer, who is liable for injuries caused by the servant's negligence in leaving the coal hole open and unguarded.

TORT for personal injuries incurred on March 17, 1904, from stepping into a coal hole in the sidewalk near No. 865 on Washington Street in Boston, alleged to have been left open and unguarded through the negligence of a servant of the defendant. Writ dated July 15, 1904.

In the Superior Court the case was tried before *Stevens*, J. The plaintiff testified on direct examination: "I am sixty-five years of age; on March 17 I was living in Dorchester; I came into town to see the parade; after the parade I started to take a car; I strolled up the street, watching for the cars; I was on Washington Street, nearly opposite No. 865; there was a crowd of people; the hole was open and I stepped into it with my right leg; my leg went down to my waist; two gentlemen came and helped me out; the hole was in the sidewalk, about two feet from the door of the store." On cross-examination, he testified: "I was walking along slowly, and, when I got near the place where I was hurt, there was a coal team in the street, outside the gutter; I saw it several yards before I came near it; I couldn't say how many yards, — eight or ten, perhaps; there was a workman near it; he was in the gutter;

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he was shovelling coal; he was taking up coal in a shovel; he was facing toward the building; I do not know what he did with the coal; I do not know how much coal there was there; the back of the wagon was toward the building; the wagon was empty; there was only a little coal that was scattered after the man unloaded the cart; the workman was standing in the street; he was about the length or half the length of his shovel from the curbstone; when I saw him standing there shovelling coal out of the gutter, I didn't look toward the building; I looked straight ahead of me; I didn't look down; I didn't see the hole; there was a crowd coming both ways; I couldn't tell how near the people were in front of me; there may have been no one within two or three feet; this was between three and four o'clock; it was a clear day; I have seen very few coal holes since I have been in Boston; they did not have coal holes in the sidewalk in Charlottetown, Prince Edward Island, where I lived until three years ago."

One Hall, called by the plaintiff, testified on direct examination: "I keep a store, at 865 Washington Street, known as 'Hall's Beehive'; on the day of the accident I was in the store; I did not see the accident; I saw Mr. Wakefield afterwards in the store; I bought the coal from the Boston Coal Company; I had been buying coal from them for two or three years; it was the Boston Coal Company's wagon and their driver; I had no arrangement or agreement with the coal company whereby I should furnish somebody to watch the open hole." On cross-examination, he testified, among other things, that all he did about the coal was to send an order to the Boston Coal Company; he did not know who opened the coal hole; sometimes the coal hole was opened by the driver, sometimes by one of his employees. On redirect examination, he testified that his employee, one Howard, usually removed the stick underneath the coal hole cover, and the driver pried up the cover.

One Keefe, called by the defendant, testified on direct examination: "In 1904 I was driving for the Boston Coal Company, and on March 17th I was delivering coal at Hall's Beehive; I had ten bags for Hall's Beehive; it was stove coal; I unloaded my bags from the wagon on to the curbstone and waited for the parade to pass; after the parade passed by I went into

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the store and gave my tickets to the office; I said I had a half a ton of coal and they told me to put it in the coal hole; I went into the office in the store and then I went out and took up the coal hole cover; I used the shovel to cover the hole; I emptied the bags of coal into the hole, first removing the shovel and putting it back after I had emptied each bag; I was picking up some loose pieces of coal in my hand; I turned around and saw a man holding on to his ankle." On cross-examination, he testified: "I had delivered coal there before; it wasn't necessary for a man to tell me to put the coal in the coal hole, it was customary to say that. When I first arrived there I jumped off the team and took my tickets in and told them I had half a ton of coal in bags from the Boston, meaning the Boston Coal Company; I laid the tickets down and he says, put it in the coal hole, he didn't want me to carry it in the store, I suppose."

There was other testimony on both sides. At the close of the evidence the defendant asked the judge to give the following instructions:

1. On all the evidence the plaintiff cannot recover.

2. If the occupants of the store where the coal was being delivered had the right to direct or control the mode or manner of the delivery, then this action cannot be maintained.

3. If the occupants of the store, No. 865 Washington Street, had the right to direct or control the mode or manner of delivery of the coal, then I instruct you that the teamster would be the servant of the occupants so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal, although at that time he was in the general employ of the Boston Coal Company.

The judge refused to give these instructions, but instructed the jury that they must determine whether the driver was acting under the control and direction of Hall or under the control and direction of the Boston Coal Company. The jury returned a verdict for the plaintiff in the sum of $1,500; and the defendant alleged exceptions.

The case was submitted on briefs.

N. Matthews, W. G. Thompson & R. Spring, for the defendant.

J. J. O'Connor, W. J. Corcoran & C. E. Walsh, for the plaintiff.

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BRALEY, J. It is settled, that generally a traveller who suffers personal injuries from a defective public way is not as matter of law precluded from recovery simply because he had previous knowledge of the defect. *Torphy* v. *Fall River*, 188 Mass. 310, 314. *Campbell* v. *Boston*, 189 Mass. 7, 10. Under the authority of these decisions, the plaintiff's conduct could have been found consistent with the ordinary care of prudent travellers. The volume of travel in both directions being large, if the plaintiff as he walked failed to see and avoid the hole into which he fell, although observing a coal team with the back of the wagon toward the building, with a workman shovelling scattered coal out of the gutter, the jury could say, that these facts failed to prove anything more than the exercise of the ordinary freedom of locomotion, which every traveller has the right to enjoy while using the public ways, without being held guilty of contributory negligence. *Hennessey* v. *Taylor*, 189 Mass. 583. The duty of the defendant, while using the coal hole as a means of delivering coal to its customer, to use proper precautions to protect pedestrians from personal injury, and that from the discharge of this duty it was not relieved by reason of a corresponding obligation on the part of the customer, has been fully defined in the recent case of *French* v. *Boston Coal Co.* 195 Mass. 334, and no further exposition would be warranted. If during delivery, by reason of the conditions of travel the opening became dangerous, then, if left either wholly uncovered or insufficiently guarded by the teamster, this neglect furnished evidence of negligence. *French* v. *Boston Coal Co.*, *ubi supra*. Unless the cover was removed the sale could not be perfected, for delivery included transferring the coal from the wagon to the purchaser's premises. The service of the teamster was entire, even if, in response to his inquiry, directions had been given to him by the purchaser to use the coal hole, and being within the scope of his employment, the defendant, as the master, remained responsible for the negligent acts of its servant. *Driscoll* v. *Towle*, 181 Mass. 416. *Oulighan* v. *Butler*, 189 Mass. 287, 290.

Exceptions overruled.

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HENRY A. WOOD & others *vs.* INHABITANTS OF MILTON.

Norfolk. December 10, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Municipal Corporations, Officers and agents, Town meeting. *Way*, Public, Layout and acceptance. *Words*, "To indefinitely postpone."

Discussion by RUGG, J., of the character of town meetings.

Although in general the action of town meetings conforms to parliamentary procedure, it never has been held that they are governed by the strict rules of legislative practice.

A vote of a town at a town meeting "To indefinitely postpone" action on an article in the warrant calling the meeting is the equivalent of complete disapproval of the action proposed in the article.

Where the question whether a town "will vote to accept" a street "as laid out by the selectmen" is properly before a town meeting which votes "To indefinitely postpone," such vote is a final rejection of the layout and, there having been no further action by the selectmen meanwhile, if a town meeting held a year later, the warrant for which contains an article identical with that of the previous meeting, votes "to accept" the street "as laid out by the selectmen," the action of the second meeting is invalid.

PETITION, filed in the Land Court January 16, 1906, for registration of the title to certain land in Milton bounding in part on Lincoln Street, which the petitioners alleged to be a private way, the use and benefit of the whole of which, in common with other adjoining owners, belonged to them. The respondent contended that Lincoln Street was a highway duly laid out by the selectmen and accepted by vote of the town.

There was a hearing before *Davis*, J. There was no question but that Lincoln Street was a private way unless it had been properly laid out and accepted as a street by the town. The presiding judge filed a memorandum containing the following findings of fact: "The selectmen had a hearing on the matter of laying out Lincoln Street on February 16, 1900, and on February 23, 1900, voted to lay out Lincoln Street in accordance with" a certain plan. "The warrant for the town meeting of March 5, 1900, contained, as article 52, the following: 'To see if the town will vote to accept Lincoln Street as laid out by the selectmen under the acts authorizing the assessment of betterments, and appropriate money for the same.' At that meeting it was voted, in regard to article 52, 'To indefinitely postpone.'

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The warrant for the town meeting of March 4, 1901, contained, as article 35, the same language as article 52 of the warrant for the meeting of 1900, and the meeting voted 'To accept Lincoln Street as laid out by the selectmen under the act authorizing the assessment of betterments, and that the sum of nine hundred dollars be appropriated therefor.' No further or other layout was made by the selectmen than that of February 23, 1900." The presiding judge accordingly ruled: "That the vote of the town in 1900 to indefinitely postpone action on the layout by the selectmen was a final action by the town on the layout, and that the attempted acceptance by the town at the meeting of 1901 was therefore invalid," and ordered a decree for the petitioners, determining Lincoln Street to be a private way; and the respondent alleged exceptions.

A. R. Tisdale, for the respondent.

C. F. Hall, for the petitioners.

RUGG, J. The single question presented is whether, after it has been voted at a town meeting to postpone indefinitely an article in the warrant to see whether the town will accept a street as laid out by the selectmen, the town can, at a subsequent meeting called upon a new warrant containing an appropriate article, vote to accept the same street as originally laid out, without further or renewed action by the selectmen touching the subject. Primarily it is necessary to ascertain the meaning of the vote to indefinitely postpone the acceptance of the street. It is of assistance in interpreting language to consider the nature of the body or person by whom it is used. A town meeting is a single gathering of the voters of a town, called for the purpose of considering only those subjects distinctly set forth in the warrant by which the citizens are summoned. Such a meeting, although commonly consisting of but a single session, may be adjourned from time to time in order to finish its business. It is not self-perpetuating nor is it a legislative body with fixed sessions. It passes out of existence with the performance of the particular duties which called it into being. Its dissolution without affirmative action as to any of the matters properly before it is ordinarily equivalent to their rejection. The meeting, once dissolved, never can be brought into being again. Other business of the town can be transacted only at a new meeting, called

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upon another warrant, which will set forth only the subjects it can pass upon. It is not a representative body, but a pure democracy, where the citizens, as to matters within their jurisdiction, administer the affairs of the town in person. It exercises both legislative and executive functions. The freest discussion prevails, yet in some respects its proceedings are inherently somewhat summary. The technical rules of parliamentary law, designed for the regulation of deliberative assemblies, are in some respects ill adapted for the transaction of the affairs of a town meeting. Hence, although in general the action of town meetings conforms to parliamentary procedure, it never has been held that they are governed by the strict rules of legislative practice. *Hunneman* v. *Grafton*, 10 Met. 454. The ample powers possessed by moderators, recognized from earliest times and growing out of the imperative needs of the office, are inconsistent with many incidents of ordinary parliamentary law. When a meeting of such powers, limitations and general characteristics votes, as to any of its articles, indefinite postponement, this action of necessity means that the meeting is opposed to the proposition presented. Indefinite postponement by a body having only definite present existence is generally, though not universally (*Revere Water Co.* v. *Winthrop*, 192 Mass. 455) the equivalent of complete disapproval. This conclusion is confirmed by the technical meaning which the phrase has acquired in parliamentary usage. There is a consensus of opinion among writers upon this subject that it means suppression of the question, and is equivalent to a negative vote. Cushing, Law and Practice of Legislative Assemblies, § 1386. Crocker, Parliamentary Procedure, § 36. Jefferson, Manual of Parliamentary Practice, Sect. XXXIII. 2. Reed, Parliamentary Rules, §§ 121, 122. It follows that the vote of the town, when the acceptance of the street was first before it, was a rejection of the action of the selectmen in laying it out.

It remains to inquire whether, under these circumstances, the town can act a second time upon the subject without a new layout by the selectmen. The statute governing this laying out of a town way is Pub. Sts. c. 49, §§ 65, 67–71, inclusive. R. L. c. 48, §§ 65, 67–71, inclusive. The procedure marked out requires an adjudication by the selectmen or road commissioners,

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acting not as agents of the municipality, but as public officers, in the exercise of an independent, untrammelled and sound judgment, that the public necessity and convenience require the way. This adjudication can be made only after a notice and a hearing, or an opportunity for hearing, has been given to the owners of all land over which the way extends. It becomes a part of the duty of the public board, if it decides that the public interest demands the laying out of the way, to determine the amount of compensation to be paid for each parcel of land included within the boundaries of the way, and to report this award as a part of the laying out, which must be filed in the office of the town clerk seven days at least before the town meeting called for the purpose of acting upon it. None of these steps are idle formalities, but they are all requirements of substance, framed as essential and indispensable prerequisites to the appropriation of private property to this public use. *Blaisdell* v. *Winthrop*, 118 Mass. 138. The scheme provides for a hearing before and a decision by the board of public officers, and a determination, after opportunity for full discussion, by all the voters of the town deliberating in lawful meeting. These various requirements are links in a single chain; if any one is broken or unsound the whole is worthless. The final action is by the town meeting. If its seal of acceptance is placed upon the previous action, a way springs into existence; if it is refused, the whole matter fails. A due regard to the rights of the landowner demands that this course of procedure should go forward with reasonable continuity from the beginning to the end. He ought not to be hampered in the improvement of his estate by long continued procrastination and vacillation on the part of the public in deciding whether he shall be left undisturbed or a part of his property appropriated by eminent domain. Precipitate action is not required, and due consideration and discussion according to the traditions of the town meeting are desirable and provided for. But, once the matter is fairly before the town, acceptance must follow, which will appear by affirmative vote at the town meeting (or a regular adjournment thereof) at which it is first presented, or rejection is implied. The requirement for assessment of damage to the landowner leads to the same conclusion. Such determination of damages can be made only

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as of the time when the act is done. It serves the twofold purpose of giving to the voters before the town meeting an estimate of one element of the expense of the proposed improvement, and to the landowner the judgment of an impartial tribunal as to his pecuniary damages. But both these purposes, in many localities of changing values of real estate, might be frustrated, if action might be taken by the town meeting after the lapse of years.

The result is that the public way laid out over the land in question was not legally accepted.

Exceptions overruled.

BARBARA MILLER *vs.* BOSTON & NORTHERN STREET RAILWAY COMPANY.

Middlesex. December 10, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Of street railway in disposal of snow, Imputed. *Street Railway.*

At the trial of an action of tort against a street railway company to recover for injuries received by the plaintiff, while she was riding in a sleigh driven by another person, because the horse ran away owing to the fact that, when the sleigh was being driven between the street railway tracks, one of its runners became caught in a switch, there was evidence tending to show that, at the time of the accident, because of the way in which snow was thrown by the defendant from its tracks into the roadway at the sides of the tracks, driving and passing in the roadway were very difficult and the tracks instead of the roadway were being used by travellers upon the highway with vehicles, that, after the sleigh became caught in the switch, two of the occupants other than the plaintiff sought to loosen it, the horse became restless because of their efforts and ran away, and the plaintiff was thrown out and injured. There also was evidence tending to show that there had been snow storms of unusual frequency and severity and cold weather very nearly continuously. *Held*, that there was evidence from which the jury would be warranted in finding that the accident happened by reason of negligence of the defendant, and that the plaintiff's injuries resulted therefrom.

At the trial of an action of tort for injuries caused to the plaintiff, a young woman, because of negligence of the defendant which caused a horse, which was drawing a sleigh in which the plaintiff was, to run away, there was evidence tending to show that the driver of the sleigh was negligent, and a material question was, whether his negligence, if any, would bar the plaintiff from recovering. The defendant requested the presiding judge to rule that, if the jury should find that the plaintiff entrusted the care and management of the horse and sleigh to the driver and relied solely upon him for safety, then, in order to recover, she must show that the driver was, at the time of the accident, exercising due care in the

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management of the horse and sleigh. The ruling was refused and the judge charged the jury that, if the plaintiff had authority or control over the driver, and negligence on his part contributed to her injury, or if, by reason of a condition of things which she observed, she was under a duty to warn him or had reason to suppose a want of care or skill on his part, and did not warn him and such failure to warn contributed to cause the accident, then she could not recover; but that, if she had no authority or control over him, if there was no duty to warn him, and if she had no reason to suppose any want of care or skill on his part, then, if the defendant's negligence caused the injury, she could recover notwithstanding the fact that negligence of the driver contributed to cause it. *Held*, that the ruling requested was refused rightly and that the charge given was correct and sufficient.

TORT for personal injuries received by the plaintiff because the horse, which was drawing a sleigh in which she was, ran away owing to the fact that the sleigh stuck in a switch when it was being driven between the tracks of the defendant on account of a condition of the roadway alleged to have been bad because of negligent acts of the defendant in shovelling snow from its tracks. Writ in the Superior Court for the county of Middlesex dated March 14, 1905.

Other actions were brought against the same defendant by Edwin C. Miller, who owned the horse and sleigh and was the plaintiff's father, and by Henry F. Miller, 2d, a companion of the plaintiff in the sleigh, and all three actions were tried together before *Aiken*, C. J.

It appeared that the sleigh was a two seated vehicle. The plaintiff and one Kershaw were on the back seat, and one Helen Stark and two young men, one Burton R. Miller, the plaintiff's cousin, who was driving, and Henry F. Miller, 2d, were on the front seat. Burton R. Miller testified that he had been used to driving horses from his boyhood, although he had lived in Philadelphia for eighteen or nineteen years and had not driven much with a sleigh.

The evidence as to the condition of the road is stated in the opinion. It appeared that, for some distance, as the sleigh approached the crossing of the Boston and Maine Railroad with Main Street and the defendant's tracks in Wakefield, it had been driven between the double tracks of the defendant. Just before the crossing, the double tracks converged and became a single track. It was in the "V" of the switch at that point that the runner of the sleigh became caught. Henry and Burton got out

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of the sleigh and attempted to release it from the switch, the horse became restless, and almost at once plunged and then ran away and the plaintiff was thrown out. A part of the plaintiff's testimony in cross-examination was as follows: Q. "I don't know whether I asked you — you, of course, were trusting to the gentleman who was driving? You were relying for your safety on his ability to drive, were you not?" A. "Yes, sir." — Q. "And you put yourself in his care, so to speak, so far as the driving was concerned, had you not?" A. "Yes, sir."

At the close of the evidence, the defendant requested the presiding judge to rule that upon all the evidence the plaintiff was not entitled to recover; (4) that, if the jury should find that the plaintiff Barbara Miller entrusted the care and management of the horse and sleigh in which she was riding entirely to Burton R. Miller and relied solely upon him for her safety, then in order to recover she must show that Burton R. Miller exercised due care and diligence in the management of the horse and sleigh both before and after the runner of the sleigh became caught in the frog or switch; (5) that there was no evidence of negligence on the part of the defendant in the plowing and levelling or handling of the snow on Main Street at or about the place of this accident; and (8) that the plaintiff was bound, in order to recover, to show that no causes or agencies other than those over which the defendant had control contributed to cause this accident.

The presiding judge refused to rule as requested by the defendant. His charge, with regard to the right of the plaintiff to recover in case the jury should be of the opinion that the accident resulted from negligence of both the defendant and the "young men on the front seat" was as follows:

"If you find that Barbara in this aspect of the case was in no way to blame, you come to the consideration of what is her standing with reference to the young men on the front seat, or the brother and her cousin. If it is your conclusion that those two young men were in no way to blame for what happened, then there is no occasion to consider the aspect that I am about to refer to. But, suppose it is your view that the young men Henry and Burton, the brother and the cousin, did not act with the prudence that they ought to have acted, that their fault contributed. How far was Barbara to be affected by that, is the

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question. If they were not to blame, then you do not have to consider; but if they were to blame, then you come to the question of how Barbara was affected by their fault.

If she had authority or control of the two young men that were driving — I am not aware that she had, and I refer to this because I do not know what counsel claim, and I do not know what your view may be — but if she had authority or control over the two young men, then she is affected by any fault on their part and cannot recover. But the question will arise whether the sister and the cousin sitting on the back part of the sleigh had any authority or control over the two young men, one of whom is holding the reins and the other is sitting by his side on the front seat.

"If she by reason of what she saw of the condition of the road was under any duty to warn or caution either of the two young men in front and she failed to do so, she cannot recover.

"If she had reason to suppose a want of care or skill on the part of either of the two young men, and her failure to caution them contributed to the accident, she cannot recover, provided such failure in either case was in your judgment a failure to do what a person of ordinary prudence ought to do.

"If she had neither authority nor control, and if she was not under any duty to warn or caution, and if she had no reason to suppose any want of care or skill on the part of the two young men, then she may recover although her brother or cousin were to blame. Barbara, provided she acted with prudence in remaining in the sleigh, is not affected by the conduct of the two young men, unless she had control or authority over them, or unless there was from what she observed some duty to caution them, or unless she observed or knew of some want of skill or care upon their part that called upon her to warn or caution them."

In the actions against the defendant brought by Henry F. Miller, 2d, and by Edwin C. Miller, the jury returned verdicts for the defendant. In this case the jury found for the plaintiff, and the defendant alleged exceptions to the refusals of the presiding judge to rule as requested, and to the portion of his charge above quoted.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

W. V. Taylor, for the plaintiff.

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KNOWLTON, C. J. The first question in the case is whether there was evidence of negligence on the part of the defendant. There was much testimony that the road was in bad condition on each side of the defendant's tracks, that the snow was deep and difficult to pass over, that in some places there were large lumps of frozen snow, and that in others there was a high bank, sloping steeply down at the side of the road. According to the weight of the testimony the difficulty of passing at the sides of the tracks was so great that nearly all teams drove along the tracks, leaving the snow on each side without a regular path. For the changes in the condition of the snow from the condition that would have resulted from the storms alone, the jury might well find that the defendant was chiefly responsible, as it had frequently thrown out snow, and run snow plows over the tracks.

There was much evidence tending to show that the winter was unusually severe, that the snow storms were frequent and the cold nearly continuous, making it very difficult to keep the roads safe. The jury might well have found that the defendant did all that it reasonably could be expected to do. But there was a variety of testimony to show that conditions were bad near the place of the accident, and we think it was a question of fact whether they were due in any degree to the negligence of the defendant.

There was evidence to warrant a finding that, by reason of the bad condition of the road at the sides, the driver of the sleigh was not negligent in driving on the track, and that his driving there, taken in connection with the condition of the snow at the switch, was the direct and proximate cause of the accident. The fact that the plaintiff did not receive her injury immediately when the runner of the sleigh caught in the switch, but a few seconds or perhaps a minute or two afterwards, when the horse had escaped under the excitement of the collision and the attempt to extricate the runner of the sleigh, does not prevent a finding that the condition of the snow was the direct cause of the injury. *McDonald* v. *Snelling*, 14 Allen, 290. *Marble* v. *Worcester*, 4 Gray, 395. *Bowes* v. *Boston*, 155 Mass. 344. *Davis* v. *Longmeadow*, 169 Mass. 551.

The fourth request for a ruling was rightly refused. The instructions given on this point were correct and sufficient.

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They followed closely the doctrine fully stated and explained in *Shultz* v. *Old Colony Street Railway*, 193 Mass. 309.

The eighth ruling requested could not properly be given, and the exception to the refusal to give it is waived by the defendant.

Exceptions overruled.

GIDEON M. WASHBURN & another *vs.* ERNEST L. WHITE & another, trustees, & others.

ERNEST L. WHITE & another, trustees, *vs.* GIDEON M. WASHBURN & others.

ALEXANDER M. GRAHAM *vs.* GIDEON M. WASHBURN & another.

Plymouth. December 10, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Landlord and Tenant. Reference. Arbitrament and Award. Equity Jurisdiction, Specific performance, One seeking equity must do equity. *Contract*, Construction. *Summary Process for Possession of Land.*

Where a lease of land, which contemplated the making of extensive improvements and the erection of buildings upon the premises for use in business, contained a provision whereby the lessee agreed to pay rent during the term of the lease and "for such further time as the lessee may hold the same" and the lessor agreed that, if the lessee requested it, he would sell and convey the premises to the lessee at a price to be "agreed upon and fixed" by the award of three disinterested persons, one to be chosen by the lessor, one by the lessee, and the third by the two so chosen, and, on the day of the expiration of the lease, the lessee in writing notified the lessor of his determination to purchase, appointed a referee in accordance with the terms of the agreement and remained in possession of the premises, it was *held*, that thereafter, while in good faith the lessee was seeking to have the price determined and the sale consummated within a reasonable time, he was in possession under the contract of sale and not as tenant under the lease, and, although he paid nothing as rent to the lessor pending the consummation of the sale, he was not liable in an action of contract for rent, nor subject to be ejected in a summary process for possession of the land brought under R. L. c. 181.

Where, by the terms of a contract for the sale of land, the purchase price is to be "agreed upon and fixed" by three disinterested persons, one to be chosen by each of the parties to the contract and the third by the two so chosen, and there is no provision in the agreement as to the effect of an award by a majority of the three, such an award by a majority is not valid or binding upon the parties to the agreement.

On appeal from a decree dismissing, after a hearing, a bill in equity for specific

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performance of an agreement to sell and convey land, all the evidence was reported, and it appeared therefrom that the agreement was contained in a lease of the land by the defendant to the plaintiff and provided that, if the plaintiff requested, the defendant would sell and convey the land to him for a price to be "agreed upon and fixed" according to the award of three disinterested persons, one to be chosen by each party and the third by the two so chosen, and that, on the day that the lease expired, the plaintiff notified the defendant of his desire to purchase and of the name of a referee chosen by him, and three referees thereafter were chosen in accordance with the agreement. There was evidence tending to show that the referees unreasonably delayed making an award and that, although the defendant urged them to proceed with the business diligently, the plaintiff did not urge them, but on the contrary sought further delay, that, being informed that it was impossible for the referees to agree and that it would be necessary to appoint new ones, the plaintiff took no steps to do so, and declined to attempt to settle the controversy in other ways when the defendant approached him on the subject. There also was evidence tending to show that the plaintiff thought that the referee appointed by him never would agree to an award which the other referees would agree to, and that he was pleased with the prospect, that he had but little property and had refused to give to the defendant security for the payment of rent pending the trial of a suit with regard to the same controversy brought against him by the defendant in the meantime, and that he did not bring this suit until after the defendant had brought such other proceedings against him. The grounds of the judge's finding for the defendant were not reported. *Held*, that it was the duty of the plaintiff to have the price determined and the conveyance made within a reasonable time, and that the presiding judge well might have found that the plaintiff did not perform that duty; or that he might have found that the plaintiff was acting in bad faith in seeking to keep possession of the property without any intention to pay for it by purchase or otherwise; and that, on either finding, the decree would be justified.

BILL IN EQUITY filed in the Superior Court for the county of Plymouth May 11, 1907, to compel performance of a contract, contained in a lease, to sell the leased premises to the plaintiffs; also

CONTRACT by the defendant trustees in the suit in equity against the plaintiffs therein, for rent due under the lease, the writ being in the same court, dated March 2, 1907; also

SUMMARY PROCESS under R. L. c. 181, by a lessee under a lease in writing from the defendant trustees in the suit in equity to obtain possession of the premises from the plaintiffs therein. Writ in the Police Court of the city of Brockton dated March 30, 1907.

The bill in equity was heard before *Fessenden*, J., and a commissioner was appointed to take the testimony under Equity Rule 35. The presiding judge ordered a decree that the bill be dismissed, and the plaintiffs appealed.

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The actions of contract and of summary process, the latter on appeal, were heard before *Sherman*, J., on agreed statements of fact. He found for the plaintiffs in both cases, and the defendants appealed.

The facts are stated in the opinion.

A. F. Barker, (*H. B. Wilbur* with him,) for the plaintiffs in the first case and the defendants in the other cases.

F. W. Kittredge & W. Kittredge, for the defendants in the first case and the plaintiffs in the other cases, (*L. S. Thierry* with them in the first case).

KNOWLTON, C. J. The first of these cases is a suit in equity, brought to enforce a contract for the sale of real estate, made with the plaintiffs, in a lease from the testator of the defendant trustees, who will hereinafter be called the defendants. The defendants succeed to the property under the will of George U. White, who leased the premises to the plaintiffs for the term of twenty years. The lease expired on April 1, 1905, and it contained a provision as follows: "Or if said lessees or their heirs and assigns request it, to sell and convey the demised premises to said lessees or their heirs and assigns by good and sufficient warranty deed, free from all incumbrances for a price then to be agreed upon and fixed in the same manner as above provided for fixing the annual rental for the extension of this lease." The manner so provided was "that the same shall be fixed and determined by three disinterested persons, one to be selected by the lessor or his heirs or assigns, one to be selected by the lessees or their heirs or assigns, and the two thus chosen to select a third person," etc. On April 1, 1905, the plaintiffs gave the defendants a request in writing for the appointment of a referee to determine the purchase price of this land, with a statement that they appointed one Copeland as a referee for the same purpose. The defendants, after an interval, appointed one Fletcher as their referee to act with Copeland. Subsequently these two selected one Low for the third referee. The plaintiffs have continued in the occupation of the property to the present time without paying rent.

The first question is what were the rights of the respective parties under this contract. The plaintiffs contend that they have been occupying as purchasers, whose only obligation was

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to pay the price of the property as soon as it was fixed, and the defendants contend that they were liable for rent in the meantime. It seems very plain that a lessee, availing himself of his option to buy under a contract of this kind, and remaining in occupation after the expiration of his lease, is in under the contract to purchase, and not as a tenant holding over. There can be no reasonable doubt that the contract should be construed as giving the plaintiffs a right to remain for such reasonable time as is necessary to fix the price and consummate the purchase, rather than as compelling them to vacate the premises and to leave them unoccupied for this interval. The lease contemplated the making of extensive improvements, and the erection of buildings upon the land for use in business, and several buildings had been erected and were in use by the plaintiffs and their subtenants when the lease expired. The option to purchase was in part to enable these different kinds of business to go on without interruption. Naturally it was supposed that the price would be fixed quickly, and the deed delivered and paid for without delay.

The rights of the plaintiffs were like those of persons who originally enter upon real estate and occupy it under a contract to buy it. It is the ordinary rule that, in the absence of an agreement for payment, such occupants are not liable for rent or for use and occupation. The purchase price for the land, when paid, constitutes the consideration for the property, including the use of it after possession is taken and before the title is transferred. *Westgate* v. *Wixon*, 128 Mass. 304. *King* v. *Johnson*, 7 Gray, 239. *Dakin* v. *Allen*, 8 Cush. 33. *Newell's appeal*, 100 Penn. St. 513. *Knerr* v. *Bradley*, 105 Penn. St. 190. *Stacy* v. *Vermont Central Railroad*, 32 Vt. 551. *Mack* v. *Dailey*, 67 Vt. 90. *Watson* v. *Coast*, 35 W. Va. 463, 474. *Campbell* v. *Fetterman*, 20 W. Va. 398. The general subject was considered very fully by Mr. Justice Field in *Lyon* v. *Cunningham*, 136 Mass. 532. Whatever the rights of the defendants were at common law, as holders of the title, we are of opinion that in equity the plaintiffs had a right to remain in possession under the contract of purchase while they were taking proper measures to ascertain the amount to be paid to obtain a transfer of the title.

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The referees failed to agree upon a price for the property, and on May 11, 1907, more than two years and one month after the expiration of the lease, the plaintiffs brought this bill to have the price determined by the court, and specific performance ordered, and injunctions issued against the prosecution of a suit by the defendants to recover rent, and of another suit, brought by a lessee of the defendants, to recover possession, which suits had been begun not long before. After an extended hearing the bill was dismissed, and the case comes before us on an appeal by the plaintiffs.

The grounds on which the decree was ordered for the defendants are not stated in the record, but all the evidence was reported by a commissioner. The question is whether the finding for the defendants upon this evidence was plainly wrong. *Hodgdon* v. *Cummings*, 151 Mass. 293, 295. *Brown* v. *Brown*, 174 Mass. 197, 198. The decision was not made on the ground that the award of two of the referees, not agreed to by the third, was binding, for the judge expressly ruled that it was not binding. The case of *Phippin* v. *Stickney*, 3 Met. 384, relied on by the defendants, does not decide that an award by a majority of a board of referees, to whom a submission is made at common law, is valid. It plainly states that such an award is invalid. The case was decided, not on the ground that there was a binding award, but on the ground that the contract mentioned the only three persons who could act as arbitrators, and, as they could not agree and an award was impossible, the plaintiff might recover because the contract contemplated that, under such conditions, the land should be conveyed at a reasonable price. In *Hood* v. *Hartshorn*, 100 Mass. 117, 121, it is assumed that, if appraisers fail to agree, no valid award can be made by a majority of them. See also *Wade* v. *Dowling*, 4 El. & Bl. 44; *Little* v. *Newton*, 2 M. & G. 351; *Daniels* v. *Ripley*, 10 Mich. 237; *French* v. *Butler*, 39 Mich. 79; *Security Live Stock Ins. Association* v. *Briggs*, 22 Ill. App. 107, 110; *Moore* v. *Ewing*, Coxe, 144, 147.

If a submission is made under our statute, or if the parties agree that a majority may act, the rule is different. R. L. c. 194, § 7.

Under the provision in the lease it was contemplated that, if

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the lessees would take advantage of it, they should proceed promptly to have the price determined, and should use all reasonable efforts to consummate the purchase without unnecessary delay. The opinion in *Hood* v. *Hartshorn*, 100 Mass. 117, 121, which is a case similar to the present one, contains this language: "If then one set of appraisers fail to agree, or if they act in such a manner as to render them obviously unfit to decide the matter, another appointment should be made; and a fair interpretation of the contract requires a lessee to use all reasonable efforts in his power in order to obtain suitable appraisers who will agree. He must continue to act until he puts the lessor in the wrong, or else makes it manifest that no suitable persons can be obtained to do the service within a reasonable time, which can hardly be supposed." The judge might well find upon the evidence that the plaintiffs had fallen far short of their duty in this respect, and that they were not in a condition to invoke the aid of a court of equity in the enforcement of the contract. Indeed, he might find that they had lost their rights under the contract by a failure to proceed in good faith to have the sum ascertained and the payment made within a reasonable time. There was no evidence that they ever took any measures to induce the referees to proceed with the business diligently and to finish it without unreasonable delay. Two of the referees were called by the plaintiff as witnesses, and examined at great length in regard to their action under the appointment. It appeared that the defendants endeavored in different ways to have a result reached which would settle the controversy; but nothing of this kind was shown to have been done by the plaintiffs, and, when approached by the defendants in regard to it, they declined to co-operate. In October, 1906, the plaintiffs were invited by the referees to come before them with the defendants, in the hope that in this way the referees might be assisted in their effort to come to an agreement; but they declined the invitation. On November 28, 1906, the defendants made a formal request of the plaintiffs that they should unite with them in discharging the referees for their failure to make an award, but this request was declined, with a statement that the plaintiffs preferred to give the referees "further time, rather than the appointment of a new board."

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The plaintiffs did not pay the taxes on the property for the year 1905 until February, 1907, when it was in danger of being sold for non-payment of the taxes, and they had not paid the taxes for the year 1906 at the time of the hearing in the summer of 1907. There was testimony indicating that they thought the referee chosen by them would never agree to an award to which the other two could be induced to agree, and that they were pleased with the situation in that respect. On December 7, 1906, two of the referees, Fletcher and Low — Copeland, the referee appointed by the plaintiffs, voting in the negative — made a report in writing to each of the parties that it was impossible for them to agree upon a price. The plaintiffs took no action upon this information. Afterwards the defendants brought a bill in equity to have the price fixed by other referees or by a master appointed by the court and to obtain security for the income of the property. The judge might have found from the testimony that the plaintiffs not only refused to cooperate to have the price determined in this way but withdrew without cause from an agreement which they had once made to furnish security and declined to do anything to assist in reaching an equitable result. This suit was afterwards discontinued without trial.

On February 25, 1907, two of the referees, Low and Fletcher, joined in an award, to which Copeland did not agree, and which the plaintiffs declined to recognize because it was not made unanimously.

There was evidence tending to show that the plaintiffs were possessed of but little property, one of them paying no tax but a poll tax, and the other having, besides a very small amount of property used in the business, only some small parcels of real estate which were heavily mortgaged. The value of the property to be paid for was fixed by two of the referees at $34,719.75. There was much to indicate that, if the plaintiffs originally exercised their option in good faith, with a purpose to obtain an award and pay for the property promptly, they changed their purpose, and tried to occupy it as long as possible without having the price determined, intending, if there should be an award, not to perform it unless they should deem it favorable to themselves. The present suit was not brought until they

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seemed in danger from proceedings to obtain possession, and from a trustee process to recover rent. We are of opinion that the judge was well warranted upon the evidence in finding that the plaintiffs had failed to do that which was necessary to preserve their rights as purchasers under the provision in the lease, and that they were not in a position to ask relief from a court of equity. If he also found that they were acting in bad faith, and were trying to get the use of the property with an intention not to pay for it, either as purchasers or otherwise, we cannot say that his decision was wrong. It follows that the decree in this case must be affirmed.

The next action is by the defendants in the former suit against the plaintiffs in that suit, to recover rent of the property since the expiration of the lease. The date of the writ is March 2, 1907. The case was submitted on an agreed statement of facts, with power in the court to draw inferences, and it comes here upon an appeal from a judgment for the plaintiffs. The agreed statement contains facts which show that the defendants, by the exercise of their option, came into possession as purchasers under the contract, and that, if they proceeded promptly to procure a determination of the price and a transfer of the title, they would not be liable for rent while these details of the purchase were being arranged. As we have already shown, they might, by their failure to proceed to have the price determined within a reasonable time, or by their attempt to remain in possession a long time without completing their purchase or paying rent, and with an intention not to pay the price unless the determination of it should be favorable to themselves, lose their right to hold the property as purchasers, or to set up the exercise of their option against the contract in the lease to pay the "rent as above stated and as above fixed and determined for such further time as the lessees may hold the same." There is nothing in the agreed facts, excepting mere lapse of time without obtaining an award, which tends to show that the defendants lost their right to hold the property as purchasers, without a payment of rent. It is agreed that on April 1, 1905, they made their election in good faith. The bringing by the defendants of the bill in equity now before us is also stated, but we have no other facts which tend to show that the defendants had ceased to act in good faith,

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or had failed to use efforts to obtain an award. In the absence of a statement of particulars or further facts, we are of opinion that the court was not warranted in finding that the defendants had lost their rights as purchasers, and were to be treated as in possession without legal justification, subject to the contract which we have already quoted to pay rent after the expiration of the lease. The statement is not full enough to enable the court to determine the rights of the parties from the facts which appear of record. The judgment must be reversed, and the agreed statement of facts discharged, and the case will stand for trial.

The third suit is a summary process for the possession of land, brought in the Police Court of Brockton, under the R. L. c. 181, against the defendants in the last suit. The plaintiff claims under a lease of the premises already referred to, made by the plaintiffs in the last suit on the nineteenth day of February, 1907. This case was submitted to the Superior Court on an agreed statement of facts, with no power to draw inferences, and was decided for the plaintiff. It comes to this court upon an appeal.

This statement of facts also shows that the defendants, at the expiration of the lease, exercised their option to purchase by giving notice of their election and appointing a referee to act in fixing the price. If nothing more appeared, their subsequent possession, at least for a reasonable time, would be referred to the contract to purchase, and they would be in as purchasers and not as lessees holding over.

The summary process for the possession of land is of very limited scope. It lies if there has been a forcible entry into lands or tenements, or if there has been a peaceable entry and the possession is unlawfully held by force, or if the lessee of lands or tenements, or a person holding under him, holds possession without right after the determination of a lease, or if there has been a decree for affirmation and registration of the title to land, or a foreclosure of a mortgage of land. The only ground on which it can reasonably be contended that the present suit can stand is that the defendants were tenants, holding possession without right after the determination of the lease. Even if it be true that at common law their equitable right under their contract would not avail as against a writ of entry brought to

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enforce a legal title, their election to purchase under the contract and their possession only as purchasers would take them out of the category of lessees holding possession without right after the determination of a lease. We think it plain that, as against a purchaser holding rightfully under such a contract, a summary process for possession under this statute will not lie. *Kiernan* v. *Linnehan*, 151 Mass. 543. *Lyon* v. *Cunningham*, 136 Mass. 532. *Dakin* v. *Allen*, 8 Cush. 33. *Dunham* v. *Townsend*, 110 Mass. 440. *Larned* v. *Clarke*, 8 Cush. 29. The fact that there had been a lease which had expired did not bring them within the statute, so long as they elected to take possession under the contract for purchase, and continued to do everything that ought to be done to preserve their rights, according to the rule stated in *Hood* v. *Hartshorn*, 100 Mass. 117, 121.

In the present case, like the one last considered, there is nothing in the agreed facts but the unexplained failure to obtain an award that shows a loss of the right of the defendants to rely upon their possession under the contract of purchase. This alone is not enough. It follows that, upon these facts, they do not appear to be persons holding possession without right after the determination of the lease.

But the agreed statement is entirely barren of any information in regard to the conduct of either of the parties in reference to the causes of the long delay without a determination of the price to be paid. If the defendants, by their conduct, lost their right to avail themselves of the contract for a purchase, then they were within the provisions of this statute. Their election to buy gave them only a provisional right to occupy as purchasers. Their right depended upon the performance of their obligation to do what was necessary for the consummation of the contract within a reasonable time. On their failure to do this, they would become persons holding over without right, as they would have have been if they had not made an election to buy. See *Gould* v. *Thompson*, 4 Met. 224; *Dunham* v. *Townsend*, 110 Mass. 440, 442. In this case the judgment must be reversed and the agreed statement of facts discharged, leaving the case to stand for trial. The entries will be

Decree affirmed; judgments reversed and agreed statements of facts discharged.

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PATRICK J. DONAHUE *vs.* C. H. BUCK AND COMPANY.

Suffolk. December 11, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability.

Where the employees of a painter constructed a staging, for use on a certain job, from blocks, falls, ropes and ladders furnished by him for permanent use on that and other jobs, the mere fact that the method of using the parts was that, after having been used on a job, they were separated and not reassembled until again needed for a staging, does not make the staging so temporary a structure as not to be a part of the ways, works and machinery of the employer within the meaning of R. L. c. 106, § 71, cl. 1.

The declaration in an action of tort by an employee against his employer to recover for personal injuries contained counts under R. L. c. 106, § 71, cl. 1, 2, alleging defects in the ways, works and machinery used by the defendant and negligent superintendence, and counts at common law alleging defective appliances and failure to instruct and warn the plaintiff thereof. At the trial it appeared that the plaintiff's injury was due to the falling of a staging upon which he was working as a painter. The defendant made his stagings from blocks, falls, ropes and ladders which he kept for that use, the parts being assembled when needed for a job and taken apart when the job was finished and kept in his shop until again needed. The plaintiff had been instructed that blocks and falls to be used were hung on pegs in a certain room, and that defective ones were marked as condemned and kept in a pile on the floor. The plaintiff and a fellow workman were directed by the defendant's superintendent, who had general charge of its business, to procure three blocks and falls of a certain length for the staging in question and, going to the room where blocks and falls were kept, found only three of the required length hanging on pegs, although there also were three others of greater length upon the pegs, and delivered the three of the required length to the superintendent who sent them to the place where the work was to be done, but did not go himself. The assembling of the parts and the construction of the staging were done by the plaintiff and his fellow workmen. There was testimony by an expert that the staging fell because a rope strap on one of the blocks broke due to its being worn or chafed inside and its fibres having become somewhat "weathered" or rotten by chafing where they came in contact with the block. *Held*, that there was evidence for the jury from which they would have been warranted in finding for the plaintiff, either on the ground that there was a defective condition of the ways, works and machinery, or appliances of the defendant due to his negligence, or on the ground that there was negligence on the part of the superintendent for which the defendant was liable; and *also* that it could not be said as a matter of law either that the plaintiff was negligent or that he assumed the risk of the injury.

TORT for personal injuries received by the plaintiff, a painter, while in the employ of the defendant, by reason of the falling

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of a staging upon which he was working in the course of his duties, the first count being under R. L. c. 106, § 71, cl. 1, alleging that the injury was due to defects in the ways, works and machinery of the defendant, the second count being under cl. 2, alleging that the cause of the injury was negligent superintendence, and the third and fourth being at common law, alleging respectively that the cause of the injury was a failure of the defendant to provide and maintain safe and suitable appliances for the use of the plaintiff, and a failure to instruct and warn the plaintiff that the staging was unsafe, unsuitable and defective. Writ in the Superior Court for the county of Suffolk dated February 18, 1905.

At the trial, which was before *Dana*, J., the plaintiff testified that he had been a painter for twenty years and had worked ten or twelve years for the defendant, that the superintendent of the defendant, who had general charge of its business, one Donovan, directed him and one Reynolds to "get out the stock for a job, and three short falls," that he asked how long falls to get out, and that Donovan replied "Thirty or thirty-five foot falls." The various falls were kept in a room at the shop, and had numbers indicating their length stencilled upon them. He always had been instructed to use the falls that were hung on pegs, that falls tagged "condemned" were on the floor in a pile at one side of the room, and that they were told not to use them. When the plaintiff and Reynolds went to get the three falls that they were directed to get, they found that there were but six falls in all on pegs, one a twenty-five foot fall, one a thirty foot, another a thirty-five foot, and the other three no nearer thirty feet long than eighty or one hundred feet. They took the three shortest falls.

Donovan did not accompany the men to the job, and the plaintiff was not told to take charge. As a matter of fact, being the senior workman, he was in charge of the job in question. He and Reynolds arranged the falls and rigged the staging. The plaintiff had nothing to do with the stringing of falls.

A witness for the plaintiff who qualified as an expert on the textile strength of ropes testified that the rope strap which broke exhibited a wearing, or chafing, inside, and that the fibres inside

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seemed to have become somewhat weathered, or rotten, by chafing, where they came in contact with the block.

Other facts are stated in the opinion.

At the close of the plaintiff's case the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

W. R. Bigelow, (*L. L. Green* with him,) for the plaintiff.

E. K. Arnold, (*S. H. Batchelder* with him,) for the defendant.

BRALEY, J. The plaintiff, while at work for the defendant as a painter, was injured by the fall of a staging caused by the breaking of a rope strap on the block of one of the falls by which it had been suspended. In the performance of their work, the men constructed the staging from separate, but in themselves complete and permanent appliances, used by the defendant in the prosecution of its business. If the staging was temporary in the sense that, after having been used on one job, the parts were separated, yet the separation was only for convenience, as when next required they would be again combined. It was incumbent upon the defendant under these conditions, whether at common law or under R. L. c. 106, § 71, to provide reasonably safe, complete appliances, which the plaintiff in common with his fellow workmen could use in the performance of their work. A failure to make such provision or to warn the plaintiff of defects which were not obvious and exposed him to risk of injury furnished evidence of the defendant's negligence. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. *Ford* v. *Eastern Bridge & Structural Co.* 193 Mass. 89, 94.

After having been placed in position, upon being subjected to the ordinary strain, the rope strap broke, and an examination showed that it had become worn, rotten, and unfitted for use. The plaintiff's expert was of opinion that, if it had been sound, it would have safely sustained a much heavier load. Upon this evidence the jury could say not only that it was unfit for use, but also that the defendant in the exercise of reasonable diligence should have been aware of its defective condition. *Graham* v. *Badger*, 164 Mass. 42, 48. *McMahon* v. *McHale*, 174 Mass. 320. *Ellis* v. *Thayer*, 183 Mass. 309.

The construction of the staging having been left to the workmen, the defendant would have been freed from liability if it had provided a supply of suitable blocks from which three falls

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of the length which the plaintiff and his fellow workman were directed to get could have been selected. *Adasken* v. *Gilbert*, 165 Mass. 443, 445. *Miller* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 363. But from the evidence it appears that, upon examination, there were only three falls of this kind available or at their disposal, including the one with the defective block, and, having neglected to provide a suitable supply from which a further selection could have been made, the defendant fails to sustain this defence.

There also is a count for negligence of the superintendent. All the arrangements for painting the building were made by the defendant's superintendent, who selected the stock, designated the necessary supplies to be used and despatched the men. If the jury were satisfied that he either knew, or in the exercise of reasonable diligence ought to have known, of the defective fall, and directed its use, then the accident which followed could have been found attributable to his negligence in superintendence. *Collins* v. *Greenfield*, 172 Mass. 78. *Feeney* v. *York Manuf. Co.*, *ubi supra*.

It cannot be said as a matter of law upon the plaintiff's evidence either that he was careless, or that he assumed the risk, but this question also should have been submitted to the jury. In removing the falls from the peg where they hung, the plaintiff testified that he did not notice anything which indicated that they were unsound, and the dry rot which caused the weakness had not changed their outside appearance. There was no obligation resting upon him to inspect the block, and he had the right to rely on the presumption that the defendant had provided reasonably safe instrumentalities. *Feeney* v. *York Manuf. Co.*, *ubi supra*. *Garant* v. *Cashman*, 183 Mass. 18, 18, 19.

Exceptions sustained.

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JULIA F. PEAKS *vs.* MELVILLE L. COBB.

Suffolk. December 11, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Landlord and Tenant, Covenant against subletting. *Lodger*. *Words*, "Occupy or improve."

A covenant by the lessee, in a lease of a part of a building owned by the lessor, not to "lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein but with the approbation of the lessor thereto in writing," is not broken by the lessee if he allows a lodger to occupy one of the rooms included in the lease under a contract by which the lodger pays a certain price per week for the room and its furnishings and care provided by the lessee.

TORT for injuries received by the plaintiff alleged to have been due to a defective walk on premises occupied by a building of the defendant wherein she had lodgings with one of the defendant's tenants. Writ in the Superior Court for the county of Suffolk dated March 25, 1901.

There was a trial before *Bond*, J. At the conclusion of the evidence the defendant requested that a verdict for him be directed, and his request was refused. Thereupon, by agreement of parties, a verdict for the plaintiff was returned and the case was reported by the presiding judge to this court for the determination of the question whether, because of the clause in the lease described in the opinion, the plaintiff was precluded from recovering. Other facts are stated in the opinion.

W. H. Hitchcock, for the defendant.

H. C. Attwill, (*A. T. Smith* with him,) for the plaintiff.

KNOWLTON, C. J. The defendant leased the premises in his building to one Mrs. St. Leger. The plaintiff was injured upon a walk leading to the building, which was alleged to have been negligently left by the defendant in a dangerous condition. It was assumed at the trial that if the plaintiff was a member of Mrs. St. Leger's household, lawfully claiming in her right, there was evidence proper for the consideration of the jury.

In the defendant's lease to Mrs. St. Leger there was a covenant of the lessee not to "lease, nor underlet, nor permit any

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other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein, but with the approbation of the lessor thereto in writing." The plaintiff occupied a room in the premises leased to Mrs. St. Leger, under a contract with her to pay a certain price per week for the room and its furnishings and the care of it, which care was provided by Mrs. St. Leger. The defendant contends that this contract was a violation of the covenant in the lease, and that the plaintiff was not rightfully there, and that the defendant owed her no duty. The only question submitted to us is whether the evidence in regard to the covenant in this lease made it the duty of the judge to order a verdict for the defendant.

It was decided in *White* v. *Maynard*, 111 Mass. 250, that such an arrangement with a lodger is not a leasing or underletting of the premises within the meaning of such a covenant. See also *Day* v. *Lawrence*, 167 Mass. 371, 374.

The principal contention of the defendant is that the words "nor permit any other person or persons to occupy or improve the same," refer to a different kind of occupation from that of a tenant, and that they forbid one holding under such a lease to contract with a boarder or lodger for the occupation by him of specific rooms in the leased premises. We think that this contention is erroneous. The words "occupy or improve" are used here in reference to a possession which would enable one to maintain trespass against an intruder. They are joined to the earlier part of the covenant, not to add another kind of prohibited occupation to that which is previously forbidden, but to prevent the tenant from suffering or permitting a sub-tenancy, as well as from actively creating it.

We are of opinion that no breach of the covenant was shown, and that there is nothing in this part of the evidence to preclude the plaintiff from claiming in the right of the defendant's lessee.

Judgment on the verdict.

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CHARLES G. WELD *vs.* BOARD OF GAS AND ELECTRIC LIGHT COMMISSIONERS.

SAME *vs.* EDISON ELECTRIC ILLUMINATING COMPANY.

Suffolk. December 12, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Public Service Corporation. Gas and Electric Light Company. Electric Light Company.

A public service corporation cannot sell its property and franchises to another corporation in such a way as to part with the power to perform its public duties.

In regard to gas and electric lighting companies this Commonwealth has adopted legislative regulation and control rather than the encouragement of competition for protection against the evil effects of a monopoly.

An electric light or gas company, which has a franchise covering a city or town in which another company has a like franchise, if the public interest is not affected injuriously thereby, lawfully can arrange with the other company to extend its lines into one part of new territory that is being developed and to leave the other company to extend its lines into another part of such territory, so that neither company will duplicate lines in streets where the other is serving the public, this being a detail of administration which is not an illegal parting with a portion of its franchise; and such an arrangement may be upheld although certain streets in which both companies previously have run lines are included in the arrangement.

KNOWLTON, C. J. The petitioner is the owner of a house, on Bay State Road in Boston, which is equipped with wires for lighting by electricity, and connections with the electric wires of the respondent in the second suit, and also with those formerly of the Brookline Gas Company which are now owned and controlled by its successor, the Boston Consolidated Gas Company. Electricity for lighting the house was formerly furnished by this respondent, but in the year 1902 an arrangement was made between the respondent and the Brookline Gas Company, whereby the latter company became the purchaser of the respondent's conduits and wires and undertook to do all the business of electric lighting on the westerly side of a line running from the Charles River through Deerfield Street, Brookline Avenue and Chelsea Street to the Muddy River, and the respondent became the owner of the conduits and wires of the Brookline Gas Company and undertook to do the business of electric lighting on the

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easterly side of this line. The respondent's conduits and wires on Bay State Road, connecting with the petitioner's house, were on the westerly side of this line, and were then disconnected from its works, except that a single wire was left to furnish a direct current for the operation of an electric motor in the petitioner's house. Since October 28, 1903, when he ceased to be supplied by the respondent, the petitioner has been furnished with sufficient electricity for the purpose of lighting his house, either by the Brookline Gas Company or its successor, the Boston Consolidated Gas Company, and he has not made and does not now make any complaint as to the sufficiency or quality of the service, or the price charged therefor.

The petitioner filed with the board of gas and electric light commissioners a petition, under the R. L. c. 121, § 33, as amended by the St. 1903, c. 164, for an order that the respondent be directed and required to supply him with electric light at his house, upon such terms and conditions as might be found legal and reasonable after a hearing. This petition was dismissed by the board, in the exercise of its discretion. The first of the cases before us is a petition for a writ of certiorari to obtain a reversal of this order.

The second case is a petition for a writ of mandamus to command the respondent to restore its service to the petitioner upon such terms as may be legal and reasonable.*

The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the Commonwealth, through action of the board of aldermen under authority of the Legislature. It is a quasi public corporation, and as such it owes duties to the public. *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650. *Coy* v. *Indianapolis Gas Co.* 146 Ind. 655, 659. *Williams*

* Both cases were reported and reserved by *Braley*, J., for determination by the full court.

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v. *Mutual Gas Co.* 52 Mich. 499, 501. *Shepard* v. *Milwaukee Gas Light Co.* 6 Wis. 539. *Gas Light Co. of Baltimore* v. *Colliday*, 25 Md. 1.

Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties. *Central Transportation Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, and cases cited. *Brunswick Gas Light Co.* v. *United Gas, Fuel & Light Co.* 85 Maine, 532. *Gibbs* v. *Baltimore Gas Co.* 130 U. S. 396. *Thomas* v. *Railroad Co.* 101 U. S. 71, 83. *Chicago Gas Light Co.* v. *People's Gas Light Co.* 121 Ill. 530. *South Chicago Railway* v. *Calumet Street Railway*, 171 Ill. 391. *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538.

The fundamental principles, relied on by the petitioner as applicable to corporations of this general class, are well established. But the laws of this Commonwealth in regard to gas and electric lighting companies and the facts of this case give rise to considerations very different from those which induced the decisions in many of the cases above cited. In the first place, in reference to this department of public service, we have adopted, in this State, legislative regulation and control as our reliance against the evil effects of monopoly, rather than competitive action between two or more corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. Under the R. L. c. 121, §§ 1, 5, 6, 8, 14, 15, 26, 34 and 35, the board of gas and electric light commissioners are given supervision and control over all companies furnishing gas or electricity to the public for lighting, and, among other things, they may order, under § 34, any reduction in the price of gas or electric light, or improvement in the quality thereof. Under §§ 8 and 9 the courts have jurisdiction to enforce all lawful orders of the board, and all provisions of law relative to such companies. The State, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same street would often greatly increase the necessary cost of furnish-

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ing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracks, water pipes and other structures. See § 26, above quoted. Also *Attorney General* v. *Walworth Light & Power Co.* 157 Mass. 86. In reference to some kinds of public service, and under some conditions, it is thought by many that regulation by the State is better than competition.

The answer to the petition for a writ of certiorari sets forth the decision of the board upon the original petition, as it appears of record. This answer must be taken as true. The board has found that this portion of Boston, which was formerly Brookline, is at present, in large part, undeveloped, and is destined to an extensive development in the near future, and is to be an important territory for the sale of electricity. After referring to the fact that a tentative understanding between two companies, having equal rights and substantially equal facilities, relative to a division of the undeveloped territory in making future extensions of their systems, would be in harmony with the established legislative policy of the Commonwealth in regard to gas and electric companies, the board says: "A careful consideration of all the circumstances of the case does not disclose any public interest requiring an order in favor of the petitioner, and does suggest on the other hand some positive disadvantages to the public interest if such order is made. While these disadvantages may not seem serious at the present time, their importance will become more and more apparent as the territory is developed."

The petitioner is seeking the enforcement of an alleged public right. His private interest is not independent of the rights of the public, but he claims only through the public, and as one of the citizens who are to be served by the respondent. See *Brewster* v. *Sherman*, 195 Mass. 222. The facts show that he has suffered nothing in the sufficiency or quality of the service, or the price charged for it. So far as appears, he is not likely to suffer in the future. Indeed, the statutes above referred to are intended to give him perfect protection.

We come, therefore, to the question whether, under our laws, an electric light or gas company, having a franchise covering a city or town in which another company has a like franchise,

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cannot, in conducting its business, if the public interest is not thereby affected, arrange with the other company to extend its lines into one part of the territory that is being newly developed, and leave the other company to extend its lines into another part of the territory, so that neither company will duplicate lines in streets where the other is serving the public. It seems to us that, under such conditions, this is a detail of administration which is not in violation of law. In other words, we think that a corporation making such an arrangement is not subject to prosecution under a writ of mandamus, for a failure properly to exercise its corporate franchise. We are not called upon to determine in this case whether such an arrangement could be availed of as a justification, if, unexpectedly, it should turn out that the public interest was injuriously affected. We do not suggest that a corporation can relieve itself of the performance of its duties to the public under its franchise, but only that details of administration, not inconsistent with the legislative policy of the Commonwealth, may be left to the corporation, so long as adequate provision is made for the public. We go no further than to say that, under conditions like the present, the public has no grievance which the court will recognize.

We do not think it fatal to the defence that the arrangement before us includes, with the undeveloped territory into which electric lighting is expected to be extended, a street or streets in which both companies had run wires previously. The same principle applies in both cases. In neither are consumers left at the mercy of a monopoly.

The principal reasons which moved the courts to their decisions in *Portland Natural Gas Co.* v. *State*, 135 Ind. 54, in *Brunswick Gas Light Co.* v. *United Gas, Fuel & Light Co.* 85 Maine, 532, and in some of the other cases above cited, are entirely wanting in the present case.

In *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180, and in *People* v. *Rome, Watertown & Ogdensburg Railroad*, 103 N. Y. 95, a railroad corporation was allowed to discontinue a part of the public service that previously had been rendered under its franchise. It was justified on the ground that the public interest did not longer require the service. The principle which lies at the foundation of these decisions is equally applicable to the

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present case. See also *Crane* v. *Chicago & Northwestern Railway*, 74 Iowa, 330; *San Antonio Street Railway* v. *State*, 90 Texas, 520; *Bullard* v. *American Express Co.* 107 Mich. 695.

In each case the entry must be

Petition dismissed.

F. H. Nash, for the petitioner.

D. Malone, Attorney General, & *F. B. Greenhalge*, Assistant Attorney General, for the Board of Gas and Electric Light Commissioners.

E. W. Burdett, (*J. H. Knight* with him,) for the Edison Electric Illuminating Company.

JOHN T. BOSTON *vs.* OCEAN STEAMSHIP COMPANY OF SAVANNAH.

Suffolk. December 12, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Seaman. Contract. Damages.

One who has shipped as "mess boy" on a vessel for a voyage from port to port and return, under shipping articles by which his wages are not payable until the expiration of his term of service, if he is discharged by the master unjustifiably before the voyage is ended, may recover the damages suffered from his wrongful discharge.

In an action by a seaman for his alleged unlawful discharge before the termination of the voyage for which he shipped, where the defendant contends that the plaintiff was discharged rightfully for being absent from the ship without permission, if it appears that the plaintiff was given leave to go ashore for medical treatment and that the plaintiff while on shore made a complaint to a commissioner for an alleged assault upon him by the ship's fireman, and the evidence is conflicting as to whether the plaintiff had permission to go ashore to consult the commissioner as well as to go for medical treatment, it is a question for the jury, in case they find that the plaintiff's shore leave was limited to going for medical treatment, to determine whether under the circumstances the plaintiff had been guilty of such misconduct as to justify the defendant in terminating the contract.

The consent by a seaman to his discharge before the termination of the voyage for which he has shipped, which he gives on the condition that he shall receive a full month's wages, is not binding upon him if he is offered by the master wages for only five days.

In an action by a seaman against the owner of a vessel for damages for the plaintiff's unlawful discharge by the master before the termination of the voyage, in

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which the plaintiff claims a full month's pay and the necessary expenses of his return to the port of shipment as damages incurred by reason of his unlawful discharge, if it appears that the plaintiff, who was illiterate, was given by the master in the port where he was discharged an order on the owner for the amount of his wages for five days, that being the time during which the plaintiff had served before his discharge, but that the plaintiff never collected or negotiated this order and tendered it at the trial to the defendant, who refused it, the order does not constitute an accord and satisfaction unless it was accepted as such by the plaintiff, and if the evidence on this point is conflicting, it is a question for the jury whether the plaintiff, being without money and away from home, after having been denied recognition as a member of the ship's company, agreed to receive five days' wages in full satisfaction of his claim.

A seaman who has shipped for a voyage from port to port and return, who is discharged by the master unjustifiably at the outward port before the voyage is ended, can recover from the owner of the vessel as damages for his wrongful discharge, not only compensation for his loss of time, but also his necessary expenses incurred in returning to the port of shipment.

CONTRACT for $32, on an account annexed, with two items, the first being for one month's wages, $15, and the second for steamship fare from Savannah, Georgia, to Boston, Massachusetts, $17. Later the plaintiff added by amendment two special counts, one alleging his discharge by the defendant without cause and a refusal to pay him a month's wages of $15, and the other alleging a failure of the defendant, after unlawfully discharging the plaintiff, to return him to Boston, his port of shipment, and the plaintiff's consequent expenditure of $17 for travelling expenses in returning to the port of Boston. Writ in the Municipal Court of the City of Boston dated February 16, 1906.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. The evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings, also asking for another ruling numbered 2 which was made by the judge:

1. Upon the whole evidence in the case the plaintiff is not entitled to recover and the verdict must be for the defendant.

3. The plaintiff after his discharge, having received and receipted for his wages in full, is bound by such receipt and is not entitled to recover in this action.

4. There is no evidence in the case which entitles the plaintiff to recover the item of $17 as set out in the second item of the

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account annexed in the original declaration and in the second count of the amended declaration.

5. There is no evidence in the case that the plaintiff was not discharged from the vessel by his own consent and under such circumstances he cannot recover in this action.

The judge refused to make any of these rulings and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $33.79. The defendant alleged exceptions.

A. H. Russell, for the defendant.

F. S. Harlow, for the plaintiff.

BRALEY, J. The defendant's requests for rulings were properly refused. By the shipping articles the plaintiff engaged to perform the voyage from port to port and return, and his wages were not payable until the expiration of his term of service, unless he was wrongfully discharged before the completion of the agreement. *Taber* v. *Nye*, 12 Pick. 105. *The William Jarvis*, 1 Sprague, 485. *O'Neil* v. *Armstrong*, [1895] 2 Q. B. 70. But while he served as "mess boy" on the outward passage, he returned on the vessel as a passenger, and under either count of the declaration his right of recovery rests upon the ground, that having been ready and willing to perform the contract, performance became impossible because the master, who was the defendant's agent, unjustifiably discharged him before the voyage ended. *Croucher* v. *Oakman*, 3 Allen, 185. *Baxter* v. *Doe*, 142 Mass. 558, 561. *Hoyt* v. *Wildfire*, 3 Johns. 518. The master deposed that the plaintiff received his discharge for violation of the shipping articles in being absent from the ship without permission. Upon this question the evidence was conflicting. The plaintiff, while admitting his absence, gave evidence that during the passage out he had been assaulted by the ship's firemen, and applied to the mate for permission to go ashore, not only for the purpose of receiving medical treatment, but to make a complaint to the commissioner for the assault. This officer, whose authority was not questioned, issued the usual certificate for sick or disabled seamen, under which he had the right to be temporarily absent, but while the issuance of the certificate was admitted, the mate in his deposition asserted that the plaintiff made no reference to his desire to consult the commissioner. If, however, the jury believed the plaintiff, the permission included both, and he had

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not been guilty, either of a disobedience of orders, or of a violation of his contract. But, if the privilege had been limited, the master's right to discharge him before the termination of the voyage, depended upon whether he had become disqualified for further service, or his conduct had been such as to constitute a serious breach of the ship's discipline. 3 Kent Com. (14th ed.) 183. *The El Dorado*, 1 Lowell, 289. *The Nimrod*, 1 Ware, 9. *Smith* v. *Treat*, 2 Ware, 270, 294. It was accordingly a question of fact, whether under the circumstances he had been guilty of such misconduct as to justify the defendant in terminating his contract. *Atkyns* v. *Burrows*, 1 Pet. Adm. 244.

It is insisted that the plaintiff consented, but his consent could have been found conditional upon receiving a full month's wages, which were not paid, and this defence fails. See *Rosenberg* v. *Doe*, 146 Mass. 191, 193. If the contract remained in force, the order,* which never has been collected or negotiated, and although tendered to the defendant at the trial was refused, did not constitute a release, as it was unsealed, nor an accord and satisfaction of the principal debt, unless accepted by the plaintiff. *Tuttle* v. *Tuttle*, 12 Met. 551. Upon variant evidence, it was a question of fact whether the plaintiff, who was illiterate, without money, and away from home, after having been unlawfully denied further recognition as a member of the ship's company, agreed to receive a week's wages in full satisfaction of his claim. *Tompkins* v. *Hill*, 145 Mass. 379. *Fee* v. *Orient Fertilizing Co.* 36 Fed. Rep. 509; *S. C.* 44 Fed. Rep. 430.

Nor can it be said, either under the general maritime law or at common law, that the verdict was in excess of the measure of liability, because the plaintiff was permitted to recover the amount paid for his return passage. The damages suffered by a wrongful discharge, ordinarily, are the loss of time until in the exercise of reasonable diligence further employment can be obtained. But, in the present case, the plaintiff, having been deprived of the benefit of the contract under which the defend-

* This was an order signed by the master, directing the treasurer of the defendant to pay to the plaintiff $2.50 for services as mess boy on the steamship City of Augusta "during the month of February 6 to 10, 1906, five days at $15 per month."

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ant was bound to transport him to the port of shipment, the expenses incurred in returning formed a part of the indemnity to which he was entitled for the wrong suffered. *Croucher* v. *Oakman, ubi supra. Calvin* v. *Huntley*, 178 Mass. 29. *Thompson* v. *The Sam Brown*, 45 Fed. Rep. 508.

Exceptions overruled.

MOSES WILLIAMS, JR., & another *vs.* JOHN W. BOWERS & others.

Norfolk. December 12, 1907. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Tax, Sale.

In a sale of land for non-payment of taxes, if the notice of the sale describes the property as the whole of one lot and parts of two other lots shown on a plan on file in the registry of deeds, but no boundaries or divisional proportions are given of the parts of the subdivided lots that are to be sold, and the plan fails to show any subdivision of these lots, the notice is bad and the sale is illegal, and no title can be acquired by a collector's deed given in pursuance of such sale.

WRIT OF ENTRY, brought in the Land Court under St. 1904, c. 448, dated August 11, 1905, for a certain parcel of land in Dedham, consisting of lot 6 and parts of lots 5 and 7 on a plan of Fairbanks Park in Plan Book 16 in the Norfolk registry of deeds.

The demandants claimed under a tax deed from the collector of taxes of the town of Dedham to them, dated January 21, 1903, given in pursuance of a sale on January 17, 1903, for non-payment of taxes assessed to one Fred H. Searles, a non-resident.

The collector's notice of the sale was as follows:

"The owners and occupants of the following described parcels of real estate in the Town of Dedham, County of Norfolk and Commonwealth of Massachusetts, are hereby notified that the taxes assessed for the year 1902 and to the persons specified according to the list committed to me as Collector of Taxes for said town, by the Assessors of Taxes, remain unpaid, and that said parcels of real estate or such undivided portions of them as may be necessary, will be offered for sale by public auction, at

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the Assessors' Room in Memorial Hall in said Dedham," *inter alia*, "Fred H. Searles. About 5200 feet of land with the buildings thereon on Wentworth St., being lot No. 6 and parts of lots Nos. 5 and 7, block 14, on a plan of land at Fairbanks Park, recorded with Norfolk Deeds, Tax, $48.19."

In the Land Court the case was referred to an officer called a master, who filed a report, to which objections and exceptions were filed as in a suit in equity.

The only exceptions to the so called master's report which now are material are the following:

"Fifth. The tenants except to the finding and ruling of the master that the notice published substantially followed form 10, R. L. c. 13, § 87, whereas the master should have found and ruled that said notice did not substantially follow said form 10.

"Sixth. The tenants except to the finding and ruling of the master that the description of the locus was sufficiently particular; whereas the master should have found and ruled that said description of the locus was not sufficiently particular to make the sale which followed valid."

In the Land Court *Davis*, J., overruled these exceptions. He found for the demandants, and reported the case for determination by this court. If his decision was right, judgment was to be entered for the demandants; otherwise, such disposition was to be made of the case as this court should direct.

W. B. Orcutt, for the tenants.

R. D. Swaim, for the demandants.

BRALEY, J. The right of the demandants to have the land registered depends upon the validity of their title, which is derived from a sale of the estate by the collector for non-payment of taxes. The first and eighth exceptions to the master's report having been waived below, while the second, third and fourth not having been argued, must be considered as waived here, and the seventh having been disposed of by the findings of fact, the case is before us on the remaining exceptions. These relate solely to the validity of the collector's notice of sale. By R. L. c. 13, § 38, "a substantially accurate description of the several rights, lots or divisions" of the land which is to be sold must be set forth, or the notice is invalid. The office of the notice is intended to inform the owner, whether taxed to

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him or to an occupant, as well as the public generally, that his estate is to be sold. It should be sufficiently definite to enable him, and those who attend as prospective purchasers, to identify the premises, so that either he may prevent the sale by a payment of the tax, or, if a sale takes place, bidders will be attracted and compete for its purchase. The formalities of a technical survey are not required, nor will slight misdescriptions invalidate, yet the purpose of the statute plainly is, that, with the description as published in hand, the taxpayer and the bidder alike from its contents can substantially locate the land which it is proposed to sell. *Alvord* v. *Collin*, 20 Pick. 418, 431; *Farnum* v. *Buffum*, 4 Cush. 260, 266.

Under R. L. c. 13, § 41, although the collector was authorized to sell the whole, or such undivided portions of the estate as might be required to satisfy the tax with the costs of collection, yet the right to exercise this statutory power rested upon a strict compliance with the precedent condition of a sufficient notice. *Alexander* v. *Pitts*, 7 Cush. 503, 505.

After giving the estimated area, the property is described as consisting of the whole of one lot, and parts of two other lots, shown on a plan on file in the registry of deeds. But no boundaries or divisional proportions being given of the particular parts of the fractional lots, it is wholly impossible, using the description as a means of knowledge, to ascertain which portion the collector intended to sell. The plan, if considered as incorporated by reference, does not remove the uncertainty, for it wholly fails to show any division of these lots which apparently are delineated as originally surveyed. The defects caused by these omissions vitiated the notice, and the subsequent sale being illegal, the demandants acquired no title under the collector's deed. *Hill* v. *Mowry*, 6 Gray, 551. *Todd* v. *Lunt*, 148 Mass. 322. *Greene* v. *Lunt*, 58 Maine, 518. *Millett* v. *Mullen*, 95 Maine, 400. *Louisville & Nashville Railroad* v. *East St. Louis*, 134 Ill. 656. *Lake County* v. *Sulphur Bank Quicksilver Mining Co.* 66 Cal. 17.

It accordingly follows that the tenant's fifth and sixth exceptions must be sustained, and in accordance with the terms of the report the order must be

Judgment for the tenants.

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FREDERIC J. STIMSON *vs.* INHABITANTS OF BROOKLINE.

Norfolk. January 10, 1908. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, & SHELDON, JJ.

Watercourse.

If an ancient ditch or waterway, connecting two parts of a winding river, was constructed in 1652 or 1653 in pursuance of a vote of a town, and then ran in a part or all of its course through common land, and if when the ditch was cut the water of the river flowed through it without artificial aid and thereafter there was water in it a part or all of the time in every year, until it was dammed, it having at times a large flow, the stream running through such ditch can be found to have acquired the character of a natural watercourse, so that one who owns land on the river below the upper opening of the ditch, whose land is flooded, because of the damming of the outlet through the ditch, has a remedy in tort against the constructor of the dam.

If the land of a riparian owner is injured by the obstruction of a stream which he has a right to have kept open as a watercourse, his remedy by an action of tort against the obstructor is not taken away or diminished by showing that the land of all the other riparian proprietors in a like position on the river suffered similar damage from the same cause.

A riparian owner who alleges that his land has been injured by the obstruction of a stream which he has a right to have kept open as a watercourse, in order to maintain an action of tort for the alleged injury, need not show actual damage in his present use of the land. It is enough if it appears that an injurious effect is produced upon his property by the maintenance of the obstruction such as to diminish its value if the obstructor by lapse of time should acquire a right to maintain the obstruction.

TORT for damages alleged to have been sustained by the plaintiff to his land situated on the bank of the Charles River, through the damming by the defendant of Long Ditch in Dedham, by reason of which the plaintiff alleged that the quantity of water in the Charles River was increased at the upper end of the ditch, and that the water was made higher on the land of the plaintiff, thus causing his land, about two miles below the entrance to Long Ditch as the river runs, to become marshy and unfit for raising hay or pasturing cattle, and also partially destroying a roadway on the plaintiff's land. Writ dated November 4, 1901.

At the trial in the Superior Court before *Hardy*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions. The evidence is described in the opinion, where

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also the plaintiff's requests for rulings and the portion of the judge's charge relating to them are described.

H. Livermore, for the plaintiff.

W. D. Turner & S. S. Fitzgerald, for the defendant.

KNOWLTON, C. J. The evidence in this case tends to show that, at a place in Dedham called the Broad Meadows, there is a channel or depression along the surface of the ground, which is known as Long Ditch, in which there is more or less water. This ditch connects with the Charles River at each end. The river takes a very circuitous course, such that the distance between the ends of the ditch, measured by the curve and windings of the river, is six or eight miles, while the length of the ditch through the meadows is only about three quarters of a mile. The plaintiff is a riparian proprietor on the river, about two miles down the stream from the upper end of the ditch. The defendant owns land through which the ditch runs in the upper part of its course, and it has built a dam there which the plaintiff contends sets back water so as to increase the flow in the river below, to the damage of his real estate. It was undisputed that the ditch is ancient, and there was evidence tending to show that it was "cut across the Broad Meadows from river to river" in 1652 or 1653. There was evidence on the part of the plaintiff that at times it has a large flow, and he contended that it was a watercourse which, so long as it was unobstructed, carried a substantial part of the water of the Charles River. The defendant introduced evidence tending to show that it had become more or less obstructed by the growth of vegetation, trees and bushes, and by the construction of a road across the lower end of it, and by other natural or artificial causes, and that for more than twenty years it had ceased to be a natural watercourse, if it ever had been one, which the defendant denied. The defendant also contended, and introduced evidence tending to show, that the erection of the dam had no effect upon the amount of water which could pass through the ditch, because it was lower than the road above mentioned, and because of the other obstructions, and that it had no effect upon the height of the water on the plaintiff's land.

A fundamental question was whether Long Ditch was a watercourse, the water in which all persons who might be affected by

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it were entitled to have flow without obstruction, as if it were a natural watercourse, or whether it was a mere drain, dug to carry off surface water and water percolating through the ground.

The evidence tended to show that, while very ancient, it was of artificial construction. A record of a town meeting of the town of Dedham, held in the year 1652, refers to it as a watercourse to be cut through the Broad Meadow, and indicates that, in a part or all of its course, it ran through common land. The jury might infer from the evidence that it was cut through at about that time from the river at its upper terminus to the river at its lower terminus, that water flowed through it, and that there has been water in it a part or all of the time in every year since. On the other hand, they might find that years ago it ceased to be a watercourse, if it was one formerly.

The plaintiff made numerous requests for rulings relating to the law applicable to watercourses, one of which was that, "on the evidence the jury should find that Long Ditch is an ancient watercourse." Another was: "The law is the same if the ditch was dug in 1652, or more than fifty years before the suit, as if it were originally a natural watercourse."

Most, if not all of these, could not be given in the form requested, some of them because they assumed the existence of facts which were for the jury to find, and some because, while generally correct, they involved some alternative element of law which was not accurately stated. But they plainly directed the attention of the judge to the proposition that the mere fact that a watercourse was artificially dug would not necessarily prevent the existence of rights in it, after a long time, like those pertaining to a natural watercourse. Exception was taken to the instructions given, so far as they were not in accordance with the plaintiff's requests.

The judge submitted to the jury the question whether this was a natural watercourse or an artificial watercourse, and said to them: "If you find that it was not a natural watercourse, then your verdict should be for the defendant." There are portions of the charge which leave us in doubt as to the precise distinction that he intended to make between a natural watercourse and an artificial watercourse. From some of his illustra-

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tions one might infer that he meant by an artificial watercourse a drain to carry off surface water, and that he intended to include among natural watercourses watercourses artificially constructed, which were so maintained and used for many years that they ought to be treated by the courts as if they were natural watercourses. But he did not say this, nor anything like it. He said of a ditch dug for drainage, "that is not a natural watercourse; that is something made by man." In another part of the charge he said: "A course that is established by the hand of man by digging a ditch is not to be considered a natural watercourse." We think the jury understood him to mean that, if this was a flow of water, however large or continuous, which had its origin long ago in the artificial opening of a ditch to receive a part of the flow of the Charles River, especially in times of high water, it was not a natural watercourse, but was an artificial watercourse, and the plaintiff could not recover. If he meant that the term "natural watercourse" does not include any watercourse which was originally created by the directing hand of man, to determine the flow of the water by works of construction, his instruction that unless this was a natural watercourse the plaintiff could not recover was erroneous.

In *Freeman* v. *Weeks*, 45 Mich. 335, Judge Cooley said: "If by common consent the ditch was dug as a neighborhood drain and has remained open as a watercourse for a series of years, it ought to be governed by the same rules that apply to other watercourses." It has often been decided both in England and America, that watercourses made by the hand of man may have been created under such conditions that, so far as the rules of law and the rights of the public or of individuals are concerned, they are to be treated as if they were of natural origin. Baron Channell said of one of them, in *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1, "It is a natural stream or flow of water, though flowing in an artificial channel." Other cases recognizing the doctrine are the following: *Magor* v. *Chadwick*, 11 A. & E. 571. *Holker* v. *Poritt*, L. R. 8 Ex. 107. *Sutclife* v. *Booth*, 32 L. J. Q. B. 136. *Reading* v. *Althouse*, 93 Penn. St. 400. *Weatherby* v. *Meiklejohn*, 56 Wis. 73. The principle is analogous to that under which other rights are acquired in real property by prescription or adverse use. If the public au-

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thorities, representing the sovereign power, by a formal legislative act in 1652, took a part of the water of the Charles River and conducted it three quarters of a mile through a new channel, and thereby made a new watercourse, satisfying by compensation or otherwise all private rights of property affected by the change, if there were any, there would be good ground for contending that thereby a watercourse was established, which should be treated at once by the courts like a natural watercourse. Certainly after a long lapse of time, and even after no more than twenty years, if this watercourse continued without change, with the acquiescence of the public authorities and of everybody interested, there is every reason, both upon principle and authority, for applying the same rules of law to it as to a natural watercourse. In the early years of the colony the towns, for many purposes, were representatives of the sovereign power as to the management and disposition of common lands and public rights in land within their boundaries. *Attorney General* v. *Herrick*, 190 Mass. 307, 310, 312, and cases cited. It is conceivable that the mere construction of a watercourse and dedication of property to that use by all the persons whose rights of property might be affected by the change, with acceptance by the public, if public interests were involved, might give these persons the same rights in it that they would have if it were a natural watercourse. It is unnecessary to determine for every conceivable case under what conditions such rights might be created. We think in the present case, that if the flow of water through Long Ditch for many years was such as would constitute it a natural watercourse carrying a part of the water of the Charles River if the flow had begun without artificial aid, the jury might find that it was a watercourse to which the same rules of law apply as are applicable to natural watercourses.

As there was evidence tending to show that an important reason for digging the ditch was drainage of the meadows, and as there was other evidence relied on by the defendants, it was a question of fact for the jury whether it was ever in any proper sense a watercourse of any kind, or anything more than a ditch for carrying off surface water and draining the land through which it passed.

If this should be treated as a watercourse, the judge rightly

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ruled that the defendant would be liable if it maintained a dam which held back the water that otherwise would have flowed through the ditch, and thus sent down the Charles River an increased quantity of water, to the injury of the riparian proprietors below. But he was wrong in telling them that, if this was a nuisance affecting all the riparian proprietors on the stream below, not affecting one person more than another, this is not the proper remedy. By an illustration he suggested that the remedy in such a case would be by indictment, and added: "If this dam did not affect the particular plaintiff more than any other owner on the stream below the locus of the dam, then perhaps this defendant might be called into some other court to answer, rather than in this in an action of tort." The plaintiff's request on this subject was as follows: "The plaintiff can recover if he proves any special damage to his land, although similar damage may have been sustained by some other riparian proprietors." This instruction should have been given. The rule is that if every riparian owner suffers damage in his property precisely like that of every other riparian owner, he may have his remedy in an action of tort. *Lawrence* v. *Fairhaven*, 5 Gray, 110, 114. *Wesson* v. *Washburn Iron Co.* 13 Allen, 95, 101. *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1. The plaintiff asked the judge to instruct the jury that "the fact that other obstructions had grown or been placed in Long Ditch, will not preclude the plaintiff from recovery if the dam erected by the defendant contributed or tended to impede the free flow of water through the ditch." The proposition of law intended to be embodied in the request is correct. *Wheeler* v. *Worcester*, 10 Allen, 591, 601. *Jackman* v. *Arlington Mills*, 137 Mass. 277. *Sherman* v. *Fall River Iron Works*, 5 Allen, 213. *Monmouth* v. *Gardiner*, 35 Maine, 247. But there was no error in refusing the instruction, for the mere fact that the dam tended to impede the flow of water through the ditch, would not necessarily show that it would so far affect the flow of the Charles River as to cause any injury to the plaintiff's property.

It is true, as the plaintiff contends, that to maintain an action he is not obliged to show in his use of the land actual present damages. It is enough if it appears that an injurious effect is produced upon his property by the maintenance of the dam, such

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as to diminish its value, if the defendant, by lapse of time, should acquire a right to maintain the dam. *Newhall* v. *Ireson*, 8 Cush. 595. *White* v. *Chapin*, 12 Allen, 516, 520. *Peck* v. *Clark*, 142 Mass. 436. *Parker* v. *American Woolen Co.* 195 Mass. 591, 602.

Exceptions sustained.

MAYOR OF CAMBRIDGE *vs.* RAILROAD COMMISSIONERS. SAME *vs.* SAME.

Suffolk. January 14, 15, 1908. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Boston Elevated Railway Company. Cambridge. Statute.

Under St. 1906, c. 520, authorizing the Boston Elevated Railway Company to construct a subway or subways in the city of Cambridge, the mayor of Cambridge has no part in determining the number of stations in the subway. His only authority in regard to stations is given by § 13 of the act, which provides for his approval of locations of the "subway stations at convenient points, with suitable exits and approaches to and from the streets and such stations," referring only to the exact location and manner of construction of the stations which are to be built under a plan of the railway company which has received the approval of the railroad commissioners, and the determination of the mayor in regard to the matters which are to be approved by him being made subject by § 14 to revision by the railroad commissioners "if such determination when made is not satisfactory to the company."

LORING, J. St. 1906, c. 520, was enacted on June 23, 1906. It was subsequently accepted by the city of Cambridge, and on June 29, 1906, it was accepted by the Boston Elevated Railway Company, which for convenience we shall speak of as the company.

On June 28, 1907, the company, in compliance with the provisions of § 3, filed with the city engineer of Cambridge a plan "showing the proposed route or location" of the subway and the "general form and method of construction [thereof] with the location of proposed tracks and stations and approaches." The number of stations shown on this plan was two.

The mayor of Cambridge was notified of the filing of the plan, and his approval of it requested as required by § 3.

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On July 23, 1907, the mayor sent to the company a communication disapproving the plan in several matters, and in particular because in his opinion there should be four if not five, in place of two, stations. Further, the mayor stated that by the terms of a "special section" (meaning § 13) the location of stations was to be determined by him, and that "without such approval of the mayor the suggested locations of stations upon the plan in question adds nothing to the plan, and to that extent brings nothing before the railroad commissioners for their approval."

On July 29, 1907, the company filed this plan with the board of railroad commissioners, and applied to the board in writing to have it approved or altered in accordance with § 3. The company in this application stated that if the communication of the mayor dated July 23 was to be taken to be a determination by him of any question arising under St. 1906, c. 520, which he was authorized to determine, the application then filed was to be taken to be an application for a revision thereof under § 14 of that act.

The board set down this application for hearing on September 11. At the hearing on September 11, the mayor, by the city solicitor acting as his counsel," objected to any further hearing upon the ground that no subway stations had been located, and that there was no appeal from the action of the mayor upon the location of subway stations, with their exits and approaches, his authority upon that question being exclusive; that the board had no right, in the absence of the approval of the location of stations by the mayor, to consider the matter of stations in connection with the plan as filed, and that the other features of the plan were so connected with the location of stations that it was impracticable for the board to proceed with the hearing upon that plan at all until the stations had been located with the approval of the mayor of the city of Cambridge."

At this hearing a further question was raised, namely, whether the mayor had or had not exercised fully the authority given him by § 13. The hearing was then adjourned until September 17.

On September 16 a formal application was made to the mayor by the company, asking him to approve the location of the two stations shown on the plan then on file in the office of the rail-

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road commissioners, together with suitable exits and approaches. Accompanying this application the company sent to the mayor a letter in which it stated that this petition was sent to him in accordance with the understanding had at the hearing on September 11, in order that action might be taken on it and the matter come before the board at the adjourned hearing to be held on the next day, September 17. The company further stated that they had intended to delay the application to the mayor for the approval of the stations until detailed plans could be made, and that the present course of action was taken to expedite the hearing before the board.

To this communication the mayor made no answer. The hearing was adjourned to September 20, and then to October 10.

On October 6 the petition and suit now before us were brought.*

The petition is a petition for a writ of prohibition asking that the railroad commissioners may be forbidden to proceed with the hearing. The suit is a suit in equity, brought under § 31 of the act, (St. 1906, c. 520,) to have the commissioners enjoined from further proceeding with it.

Both are founded on the contention of the mayor, which already has been stated, that he has the sole and final authority to locate the stations, and that until the location of stations with their exits and approaches has been fixed by him, the time has not come for filing a plan and procuring the approval or alteration of it by the railroad commissioners.

If the petitioner's is the true construction of St. 1906, c. 520, the building of this subway (which the mayor stated and truly stated in his letter of July 23 to be only "primarily" for the benefit of the citizens of Cambridge), is dependent upon the railway company's being willing to accept the mayor's determination, (first) as to how many stations are to be built, and (second) as to the exits and approaches to them. The second (the exits and approaches) is a matter of secondary importance in this connection. On the face of the matter it would be strange if the Legislature intended the building of this subway to be dependent upon the mayor of Cambridge coming to a just

* Both cases were reserved for determination by the full court.

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determination on the number of stations. But when it is considered that the number of stations goes to the root of the whole problem, the result is stranger still. The number of stations does go to the root of the problem because it depends upon the kind of service to be rendered. It depends upon whether there is to be local service only or through service only, or a combination of the two, and if a combination of the two, how that combination is to be worked out. These are matters which the Legislature had no reason to suppose would be best determined by a mayor of a city.

We find nothing, however, in the act which bears out the mayor's contention.

By § 3 a plan is to be filed with the railroad commissioners, within a year after the acceptance of the act by the company, and before the work of construction is begun, for their approval or alteration, "whether the mayor has or has not approved" it. This plan is to show "the proposed route or location . . . and . . . the general form and method of construction . . . with the location of proposed tracks and stations and approaches," and the board, after notice and hearing, "shall approve such plan or alter the same in such manner as it may deem necessary."

So far as the matter of stations enters into the general problem, it is to be submitted to the railroad commissioners at this time and is to be decided by them after hearing. When that has been done, the time has come for the company to submit to the mayor under § 13 the exact location of the stations which are to be built under the plan which has then received the approval of the railroad commissioners, having regard to the question of these stations being at convenient points and to their having suitable exits and approaches to and from the streets.

Further, to prevent the possibility of a deadlock in the matter, if the mayor determines not to approve under § 13 what the public convenience requires should be approved, an appeal is given by § 14 from that determination to the railroad commissioners.

We are therefore of opinion that it is the duty of the railroad commissioners to proceed with the hearing on the petition of the company filed on July 29, 1907. In view of the conclu-

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sion to which we have come on the merits there is no occasion to consider the questions of remedy which have been argued in the cases now before us.

The entry must be

Petition for prohibition denied; bill in equity dismissed.

G. A. Pevey, for the petitioner.

D. Malone, Attorney General, & *F. B. Greenhalge*, Assistant Attorney General, for the railroad commissioners.

F. E. Snow, for the Boston Elevated Railway Company as *amicus curiae*.

ANNIE PEARLSTEIN, administratrix, *vs.* NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

Barnstable. January 17, 1908. — February 28, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Gross, Causing death.

At the trial of an action of tort under R. L. c. 111, § 267, brought against a corporation operating a railroad by the administrator of one whose death was alleged to have been caused by reason of gross negligence of the defendant's employees, the testimony of one of the plaintiff's witnesses tended to show that the plaintiff's intestate had brought a heavy machine to a freight agent of the defendant for shipment, that the freight agent directed him to load it on to a car, and that he and other employees of the defendant and the witness helped the plaintiff to do so, that one employee of the defendant was inside of the car with a rope attached to the machine upon which he was directed to pull in order to steady the machine as it stood upon rollers or skids running to the car from the wagon from which it was being unloaded, that he started to jump and dance and whistle, and immediately the machine fell. *Held*, that there was evidence which would warrant the jury in finding that the death of the plaintiff's intestate resulted from gross negligence of an employee of the defendant.

TORT under R. L. c. 111, § 267, to recover for the death of the plaintiff's intestate alleged to have been caused by gross negligence on the part of a servant of the defendant. Writ in the Superior Court for the county of Barnstable dated March 8, 1905.

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There had been a previous trial of the case at which the jury returned a verdict for the plaintiff. Exceptions taken by the defendant at that trial were sustained by this court in a decision reported in 192 Mass. 20. According to the bill of exceptions before this court at that time, the witness Yelkin, mentioned in the opinion, had testified in direct examination that the plaintiff's intestate, for whom he worked, brought a heavy machine to the freight agent of the defendant at West Barnstable to be shipped to Boston, that, under directions of the freight agent, they attempted to load the machine into a car with the assistance of an employee of the defendant named Cook, Cook standing in the car and pulling on a rope attached to the machine to steady it as it stood upon rollers or skids running to the car from the wagon from which it was being unloaded, that Cook "started to jump, and dance and whistle, and stopped pulling the machine," and Yelkin told him not to play with the rope, but to "keep the rope good," that "for three or four minutes the machine went, and then it fell down." "After I said 'Stop, John,' I started moving the machine and the next thing that happened, the machine fell." And that in cross-examination he testified as follows: "Q. And what did he do then, when you said 'Stop, John,' did he stop? A. He stopped this time."

There was a retrial of the case before *Fessenden*, J. The evidence introduced on behalf of the plaintiff, excepting the testimony of Yelkin, was substantially the same as that reported in the bill of exceptions when the case was before this court before. Yelkin's testimony with regard to the conduct of Cook was, in direct examination, as follows: "Cook held the rope and started dancing and whistling, the rollers were not under the machine, and he jerked the rope like that [indicating]. I say, 'John, stop whistling and dance and hold the rope pretty good.' Well, we started moving the machine from the tipcart about a few inches and they started fixing the rollers, Hiller [the freight agent] did, and then Cook started to whistle and dance, and we started the machine and gone four or five inches this time and I said 'You keep still your whistle and dance.' Just before the machine fell he started to whistle and dance and jerk the rope. The machine fell right off." In cross-

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examination, on the same subject, he testified: "The machine was still in the tipcart and Cook was in the car holding the rope and started to dance and whistle and jerked the rope. I said 'Stop John. Hold the rope good,' and he stopped this time. Then Hiller lifted up the machine to put the rollers under. Then the machine was moved along a little bit, and Cook started again to whistle and dance and jerk the rope. I spoke to Cook and told him to stop and hold the rope good, and he stopped. He think it was funny. Hiller put the second roller under the machine. Pearlstein was standing back of me on the one side, and Hiller and Crocker on the other, Cook was standing in the car with the rope. The rope was not round an iron rod, Cook held it in his hand. There was no pushing this time because Hiller was putting the rollers underneath the machine and I was holding it on one side. We now had two rollers under the machine and I was pushing; the machine had two pieces of joist on each side fastened on each leg, a little wider than the skids about five or six inches. The machine was about five or six inches wider than the skids. We had been working on the machine five or six minutes before we got it two feet out of the cart. Hiller kept fixing the rollers until finally the machine was entirely out of the cart and was on the skids and it was on even and Cook was holding the rope. . . . We started moving the machine just a little bit, four or five inches, and it moved a little, and he began to whistle and dance, and I said 'Keep still and hold the rope' and by this time the machine came down." In re-direct examination he stated: Q. "Just before the machine fell what was Cook doing?" A. "He was dancing and whistling and jerking the rope." — Q. "Just before the machine fell what was he doing with the rope?" A. "He was starting to dance and whistle and jerking the rope. I told him 'Keep still, John. You hold the rope and stop your whistle and dance,' and this time fell the machine."

The presiding judge refused to direct a verdict for the defendant and also refused to rule that there was no evidence for the jury of gross negligence on the part of Cook, there was a verdict for the plaintiff, and the defendant alleged exceptions.

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R. A. Hopkins, for the defendant.

L. Bryant, (*H. M. Hutchings* with him,) for the plaintiff.

KNOWLTON, C. J. This case has once before been considered by this court, and it was reported in 192 Mass. 20. The only question now presented which is not covered by the former decision is whether there was evidence to warrant a finding that Cook, one of the defendant's servants, was grossly negligent, and that his negligence caused the accident. Upon the evidence at the first trial it was held that the testimony would warrant a finding that he was negligent, but not a finding that he was grossly negligent. There was much conflict of evidence, and the plaintiff's case on this point rests almost entirely upon the testimony of Yelkin. He said that Cook held the rope, and started dancing and whistling, and jerked the rope. He added: "Just before the machine fell he started to whistle and dance, and jerked the rope. The machine fell right off." He gave this testimony in a variety of forms, in connection with his description and that of others as to how the machine fell. Notwithstanding the contradiction of him, and the seeming improbability of a part of his testimony, which was materially different from that at the former trial as it appears in the bill of exceptions on which the former decision was made, we are of opinion that it was a question for the jury whether Cook was grossly negligent. *Hartford* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 365. *Evenson* v. *Lexington Street Railway*, 187 Mass. 77. *Gordon* v. *West End Street Railway*, 175 Mass. 181.

Exceptions overruled.

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JOSEPH H. LANDRIGAN *vs.* TAYLOR-GOODWIN COMPANY.

Essex. November 8, 1907. — February 29, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action of tort brought against the proprietor of a coal shed by one employed therein, in which the plaintiff sought recovery for injuries received by reason of the falling upon him of a wheelbarrow of coal alleged to have been due to a defect in a runway upon which a fellow workman, without negligence, was pushing the barrow, it appeared that the shed contained nine bins, that the runway was over seven feet wide in the clear and that its flooring consisted of two inch spruce plank laid lengthwise of the way. The barrow had two wheels forty-two inches in diameter, was about four feet and a half wide between the outside of the hubs, and weighed, with its load, about fifteen hundred pounds. There was no evidence of the width of the tires of the wheels of the barrow. The alleged defect in the runway was a worn place about ten inches long, one and one quarter inches wide and one half of an inch deep, and there was evidence which tended to show that, because of it, the barrow was caused to deflect and run over the side of the runway and fall upon the plaintiff. *Held*, that there was no evidence of negligence on the part of the defendant, since he could not reasonably have anticipated that so slight a depression in the plank would cause such a deviation of the barrow.

TORT against a corporation maintaining coal sheds in Haverhill, by an employee therein, to recover for personal injuries caused by a wheelbarrow loaded with coal falling upon him, which was alleged to be due to a defect in a runway. Writ in the Superior Court for the county of Essex dated January 20, 1905.

There was a trial before *Sherman*, J. It appeared that the shed in which the accident happened was one hundred and seventy feet long, stood between a railroad and the Merrimac River, and contained nine bins. Three runways ran across the top of the bins, and coal was transported by wheelbarrows along the runways and placed in the proper bins. The wheelbarrow which struck the plaintiff in the manner described in the opinion was of iron, had two wheels and measured four feet and eight inches in width from hub to hub. The width between the wheels was about four feet, and the diameter of the wheels was about forty-two inches. Other facts are stated in the opinion.

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At the close of the evidence, the defendant requested that a verdict in its favor be directed, but the presiding judge refused the request, and the defendant excepted.

J. G. Walsh, for the defendant.

J. P. Sweeney, H. R. Dow & L. S. Cox, for the plaintiff, submitted a brief.

HAMMOND, J. This was an action of tort against an employer to recover damages for personal injuries sustained by an employee through the alleged negligence of the defendant. The first question is whether the evidence was sufficient to warrant the jury in finding the defendant negligent.

The facts set out in the bill of exceptions as to the size, shape and construction of the building and the runway are undisputed. The accident was caused by the fall of a barrow loaded with coal from the runway upon the plaintiff.

Upon the evidence the jury were justified in finding that, while a fellow servant of the plaintiff was wheeling the barrow of coal along the runway and was coming down the grade at a point between bin number 5 and bin number 4, the right wheel of the barrow became deflected by a worn place in the plank; that in spite of his efforts the barrow swerved to the left with such force as to go over the left side of the runway and fall upon the plaintiff; and that all this occurred without any negligence on the part of the fellow servant.

The worn place was about eight or ten inches long, one to one and a fourth inches wide, and one fourth to one half an inch in depth in its deepest part; and it is argued by the defendant that even if the worn place was the cause of the deflection of the barrow, it could not have been reasonably anticipated by the defendant that so slight a depression in the plank would cause such deviation, or indeed would have any influence whatever upon the motion of the barrow; and hence that there was no negligence in the defendant.

This contention seems to us sound. The runway was a number of feet in length, over seven feet wide in the clear, and the flooring consisted of two inch spruce plank laid lengthwise of the way. It was intended for rough work. The barrow for whose use the runway was intended weighed about four hundred and fifty pounds and carried from ten to eleven

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hundred pounds of coal, so that, when filled, the whole weight was about fifteen hundred pounds. It had two wheels, the width of the tires of which is not given. It cannot be expected that such a runway, used for the passage of such a barrow, can be kept as smooth as a billiard table or a dining table. The wood naturally would be more or less dented after a while. The depression was very small, — only one half an inch deep at its deepest part. When one reflects upon its diminutive size, either when taken by itself or in connection with the general size of the way, and then considers the size and weight of the barrow when loaded, it seems almost inconceivable that such a depression could have deflected the progress of the barrow to any extent whatever. But, however that may be, under the circumstances we do not think that the failure on the part of the defendant to anticipate the possibility of a deflection from such a cause and to take care to prevent it can be regarded as negligence. See in this connection *McDonald* v. *Dutton*, 190 Mass. 391.

Exceptions sustained.

HERBERT AUSTIN *vs.* LORENZO F. PAPANTI.

Suffolk. November 18, 1907. — February 29, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Bills and Notes, Payment.

At the trial of an action of contract upon a promissory note by the payee against the maker, it appeared that, at the time when the note was delivered, the defendant held by assignment the interest of a beneficiary under a trust, and that, contemporaneously with the delivery of the note, he gave to the plaintiff an order on the trustee for its amount. The plaintiff gave the order and the note to the trustee, and it appeared that thereafter the trustee had in his possession funds which he could have applied in payment of the note. The defendant contended that the foregoing facts showed a payment of the note. It did not appear either that the trustee accepted the order or applied funds of the beneficiary to the payment of the note. *Held*, that there was no evidence of payment to submit to the jury.

CONTRACT on a promissory note. Writ in the Municipal Court of the City of Boston, dated January 20, 1904.

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On appeal to the Superior Court the case was tried before *Bell*, J. The defendant did not deny the execution and delivery of the note, but relied solely on the contention that the facts showed a payment, and filed twelve requests which in various forms asked for rulings to that effect. The presiding judge refused to rule as requested, but ruled that no defence was made out by the defendant and directed a verdict for the plaintiff; and the defendant alleged exceptions.

H. Dunham, for the defendant.

S. S. Fitzgerald, for the plaintiff.

HAMMOND, J. The consideration for the note was advanced by the plaintiff at the request of the defendant, to pay a premium due on a life insurance policy in which one Henry W. Austin and the defendant were both interested, the former as the person whose life was insured, and the latter as co-assignee with one Ellis, to secure them as creditors of the former. The defendant and Ellis held also for the same purpose an assignment of Henry W. Austin's interest in a certain trust created for his benefit under the will of his father, the trustee being Walter Austin.

At the trial the defence relied upon was payment, the burden of showing which was of course upon the defendant. It appeared that at the time the note was given the defendant gave to the plaintiff, as a security for its payment, an order for the amount of the note upon Walter Austin as trustee of Henry. At this time Walter was away, but on his return, he as trustee having in his hands funds payable to or for the account of Henry, paid some of it to the plaintiff, to reimburse him for certain sums theretofore lent by him to Henry, not including however the sum for which the note and order were given. Neither the note nor order have ever been paid to the plaintiff. It appears however that upon Walter's return the plaintiff turned over to him the note and order, and the evidence would warrant a finding that thereafter Walter had enough money in his hands to pay the order. Upon this state of things the defendant strongly insists that in law the order has been paid and in that way the note has been paid.

This position however is not tenable. Even if it be assumed that the defendant and Ellis were entitled as against Henry to receive the money left in the hands of the trustee, it nowhere

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appears that the trustee ever recognized such a right. He was trustee for Henry. The order was drawn not by Henry but by the defendant, and it does not appear, nor can it fairly be inferred from the evidence, that he ever accepted it or ever intended to pay it. On the contrary the evidence, so far as it goes, shows to the contrary. The simple fact that he could have accepted the order if he had so chosen, and that he had money enough to pay it is not enough.

At the close of the evidence the defendant presented twelve requests for ruling. It is unnecessary to go over them in detail. We see no error in the manner in which the court dealt with them.

Exceptions overruled.

KRISTINA LUKKONEN, administratrix, *vs.* FORE RIVER SHIP BUILDING COMPANY.

Norfolk. November 18, 19, 1907. — February 29, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Notice under R. L. c. 106, § 75. *Executor and Administrator.*

At the trial of an action of tort under R. L. c. 106, §§ 71, 73, by the administratrix of one alleged to have been fatally injured while in the employ of the defendant, it appeared that the plaintiff was a sister of the intestate, whose mother was living, and that she, with the mother's assent, was appointed administratrix in May of a certain year. The injury to the intestate occurred in January of the same year. The plaintiff, in order to prove the notice required by R. L. c. 106, § 75, introduced in evidence a letter, written in March of that year, which set forth the details of the injury and was received by the defendant as required by the statute, but which was signed in his own name by one who, although he was the attorney of the sister who afterwards was appointed administratrix and sent the letter with her authority, was no relative of the intestate. *Held*, that the notice was insufficient because it was not given by any one of the persons specified by R. L. c. 106, § 75.

The right of the administrator of one whose death has resulted from one of the causes mentioned in R. L. c. 106, § 71, to give to the intestate's employer the notice required by § 75 of that chapter, in case the intestate has died without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, is not vested in the administrator until he is appointed.

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TORT for conscious suffering and death of the plaintiff's intestate alleged to have resulted from an injury received by him while in the defendant's employ. Writ in the Superior Court for the county of Norfolk dated October 7, 1905.

The declaration contained six counts, the first and second alleging causes of action under R. L. c. 106, § 71, cl. 1, and § 73; and the third and fourth alleging causes of action under R. L. c. 106, § 71, cl. 2, and § 73. The fifth and sixth counts alleged causes of action at common law, but at the trial the plaintiff elected to proceed upon the first four counts only.

At the trial, which was before *Hardy*, J., the plaintiff introduced the following, upon which she relied to prove the notice required by R. L. c. 106, § 75:

"March 20, 1905.

"On Jan. 23d last, a little after eleven o'clock A. M., Matti Jarveta, alias Matti Yarneta H 253, was killed in your ship yard while he was employed by your company, and while he was engaged, under the orders of one of your superintendents, in helping to roll a large smoke stack or other similar mechanism. So far as is now known the cause of his injury and death was by being crushed under said smoke stack from one of the causes for which a right of action against your company is given in Ch. 106, Sec. 71, clause first or second, of the Revised Laws of this commonwealth. Mr. Jarveta died in about 15 or 20 minutes after his injury, and this notice is given by me in his behalf at this time because no administrator has yet been appointed for him.

"Signed, Charles Allen Taber.

"To the President or other official of the Fore River Shipbuilding Co."

It was not disputed that the signer of the notice was an attorney at law and, when he signed it, was the attorney of Kristina Lukkonen, who knew and approved of his signing and sending it; that the latter was the sister of Jarveta, whose mother was living, and that on May 15, 1905, with the assent of the mother, she was appointed administratrix of the estate of Jarveta.

At the close of the plaintiff's evidence, the defendant rested, and the presiding judge ruled that there was no evidence to

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support the first two counts of the declaration, but "that there was evidence for the jury that the deceased was in the exercise of due care and was injured by the negligence of the defendant"; that the notice in evidence "sufficiently stated the time, place and cause of the injury, and that it was received by the defendant within sixty days of the date of the injury," but that it "did not show a compliance with the requirements of R. L. c. 106, § 75." He therefore directed a "general verdict for the defendant on the first two counts, and a special verdict for the defendant on the third and fourth counts . . . because the notice . . . was not signed by any person who had a right under" R. L. c. 106, § 75, "to give such notice so as to maintain an action thereon"; and the plaintiff alleged exceptions.

R. T. Parke & C. A. Taber, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

HAMMOND, J. It is very questionable whether there is any evidence of the due care of the plaintiff's intestate, or of the negligence of the defendant, but we have no occasion to examine either of these questions because we are of opinion that there has been no compliance with the statutory requirement as to notice. The accident occurred on January 23, 1905. Within sixty days the notice shown in the record was given. No other has been given; and the question is whether that was sufficient.

The notice states among other things that Jarveta was killed "in your shipyard"; that he died in about fifteen or twenty minutes after his injury, and that "this notice is given by me in his behalf at this time because no administrator has yet been appointed for him." It was signed by Mr. Taber in his individual name. He was at that time the attorney for the plaintiff, but that fact does not appear upon the face of the notice. The fair construction of the notice is that it is given in behalf of the administrator thereafter to be appointed.

So far as material to the question before us, the language of the statute under which this action is brought, as to notices, is the same as that in the statute providing for actions for injuries received upon the highway. R. L. c. 106, § 75; c. 51, § 21.

In *Taylor* v. *Woburn*, 130 Mass. 494, the person injured died

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soon after the accident, and the notice was given by his father. The statute (St. 1877, c. 234, § 4) provided that the notice might be "given by the person injured or by any other person in his behalf." It was held that the notice was good upon the ground that the father at the time of the notice had the right of administration and was subsequently appointed administrator, "so that the person who gave the notice was the person who in law was bound to give the notice, and the only difference to the defendant in respect to it was that he gave the notice sooner than by law he was required to do." "The father had the right of administration upon his [the son's] estate . . .; and, in anticipation of such administration, he had authority to do what was necessary to preserve his [the son's] estate and his right of property." It is to be observed that the statute did not contain any express provision for notice by an administrator, nor any provision for the extension of the time within which the notice should be given in case of the death of the injured person, and the decision was reached by the application of general principles as to the administration of estates to the facts of the case.

In *Nash* v. *South Hadley*, 145 Mass. 105, the statute, having been amended by St. 1881, c. 236, and re-enacted in Pub. Sts. c. 52, § 21, (R. L. c. 51, § 21,) after saying that the notice shall be in writing signed by the person injured or by some person in his behalf, further provided that "if from physical or mental incapacity it is impossible for the person injured to give the notice within . . . [thirty days from the time of the accident] he may give the same within ten days after such incapacity is removed, and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment." The injured person lived more than ten days in a condition in which it was possible for him to have given the notice required by the statute. The only notice was given by his son within thirty days after the decease of the injured person, the son being the executor named in his will and having been appointed such executor subsequently to the giving of the notice. The notice was held to be bad. In giving the

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opinion of the court, Devens, J., says: "It is true, that, if the law had remained as it was when *Taylor* v. *Woburn* was decided, the notice in the case at bar would, under that decision, have been sufficient. But when the Legislature has provided for the circumstances under which a notice may be given by an executor or administrator, it must be understood that it has dealt with the whole subject, and has provided for all the cases in which a notice by either of them will be sufficient." And consequently it was held that when the injured person had survived ten days or more, not exceeding thirty days, and during that time was himself of sufficient capacity to give a notice, a notice by the executor was bad.

In the case before us we have not even the case which was left undecided in *Nash* v. *South Hadley*, namely, whether a notice given by one who subsequently is appointed executor of the injured person is sufficient. Here the notice was not given by the person injured, or by the administrator, or by the person who became administrator. The person who gave the notice was a stranger to the estate. Neither upon him nor upon his client rested the duty to care for the estate. In *Gustafsen* v. *Washburn & Moen Manuf. Co.* 153 Mass. 468, a notice by the widow was held good, mainly upon the ground that, the death being instantaneous, the right of action was in the widow alone. It has since been decided that in such a case notice may also be given by the executor. *Daly* v. *New Jersey Steel & Iron Co.* 155 Mass. 1. Since the decision in the Gustafsen case, St. 1887, c. 270, has been amended so that the action in behalf of the next of kin may be brought by the administrator; and we think that the doctrine of that case should not be extended beyond the limit therein reached. It follows that, at the time this notice was given, it was not such as the statute required.

It is argued, however, by the plaintiff, that the person who gave the notice was at that time the attorney for the present plaintiff, the person who afterward became the administratrix, and that his act was ratified by the plaintiff after she became administratrix. In view of the express language of the statute, that position does not seem to us tenable. It seems more in accordance with the spirit and language of the statute to interpret it as meaning that the right of the administrator

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to give the notice is not vested in him until he is appointed. In any point of view, therefore, the notice must be held to be insufficient.

Exceptions overruled.

MARTHA C. DANN *vs.* LOUISE H. CANFIELD.

Suffolk. November 19, 1907. — February 29, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Devise and Legacy, Residuary clause. *Words*, "Residuary legatee."

A testator who was advanced in years and had no wife and no children of his own, but two adopted daughters, L. and M., both of whom were married, personally wrote his will upon a printed form. His relations with L. were most cordial, but with M. they were not cordial. The will contained numerous specific bequests of money, a specific devise of a pasture and of his homestead property, and provisions for the creation of a trust fund of $50,000 with detailed directions for the payment of the income and portions of the principal to various persons. L. and her children were given the benefit of $30,000 of the trust fund, and M. and her children of $5,000. Six of the nine clauses of the paragraph relating to the trust fund contained directions that, in certain contingencies, "this portion shall revert to my General Estate." The last paragraph of the will read as follows: "I hereby name and constitute my adopted daughter L. as my residuary legatee — the amount to remain as a trust fund during her lifetime — the income payable to her quarterly." It did not appear that the testator was a lawyer or had had any special instruction as to the technical meaning of the terms he used. *Held*, that it was the intention of the testator that real as well as personal estate should pass to the person named as "residuary legatee."

PETITION filed in the Superior Court for the county of Suffolk September 18, 1906, for partition of fourteen parcels of land in Rockport and one in Boston. The land formerly belonged to one Leander Miller Haskins. The petitioner and the respondent were adopted daughters of his and were his only heirs at law. Haskins left a will, but the petitioner contended that he died intestate as to the land described in the petition, while the respondent contended that that land passed by the residuary clause of his will.

The case was tried upon agreed facts before *Wait*, J., without a jury. The will of Haskins was written by himself upon a printed form. The first clause created a trust fund of $65,000

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to continue for fifteen years. Clause "A" of this paragraph provided that the respondent and her children should receive the income of $25,000 of the trust fund, and eventually that amount of the principal. Clause "B" made a like provision for the benefit of the petitioner and her children with regard to $5,000 of the trust fund. Clause "C" provided for the payment of the income of $5,000 of the trust fund to a sister for her life, and closed with "At her death this portion shall revert to my General Estate." Clause "D" provided for the payment of the income from $10,000 of the trust fund to a brother, and "in the event of his death before distribution, the income of $5,000 shall be paid to his widow if she survive and the remaining $5,000 shall revert to my General Estate. In the event of the death of both . . . this whole portion shall revert to my General Estate." By clause "E" a nephew was given the benefit of $5,000 of the trust fund, and the clause closed with "In the event of his death before distribution this portion to revert to my General Estate." Clause "F" gave a sister in law the benefit of $2,000 of the trust fund and closed "At her death this portion to revert to my General Estate." Clause "G" gave a cousin the enjoyment for life of the income from $5,000 of the trust fund, and closed, "At his death this portion shall revert to my General Estate," and clause "H," containing a direction to pay the income from $5,000, and eventually that part of the principal of the trust fund to a son of the respondent, closed "In the event of death before distribution this portion to revert to my General Estate." Clause "J" gave as public bequests the income of $3,000, and eventually that portion of the principal.

The second, third and fourth paragraphs of the will made various pecuniary bequests. The fifth and sixth paragraphs are described in the opinion, where all other material facts are stated.

The judge found for the respondent and dismissed the petition; and the petitioner alleged exceptions.

C. H. Sprague, for the petitioner.

J. L. Bates, (*F. N. Nay* with him,) for the respondent.

HAMMOND, J. The only question is whether under the will of Leander Miller Haskins the real estate of which partition is

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sought in this suit passed to the respondent. And this question turns upon the meaning to be given to the term "residuary legatee" in the last clause of the will.

There can be no doubt that "an appointment of a residuary legatee standing alone in a will would be a gift of the personal estate only. That is settled by authority." Jessel, M. R., in *Hughes* v. *Pritchard*, 6 Ch. D. 24, 27. See also *Windus* v. *Windus*, 6 DeG., M. & G. 549; *In re Methuen & Blore's Contract*, 16 Ch. D. 696, and cases there cited; *Gethin* v. *Allen*, 23 L. R. (Ir.) 236, and cases cited. But there can be no doubt also that persons not well educated, or at least not well instructed in law, frequently use the term "legatee" as designating a person who by virtue of the gift is to take land as well as personalty, and that in common parlance the term implies any person who receives a benefit under a will. Indeed, as said by Cranworth, Lord Chancellor, in *Windus* v. *Windus*, *ubi supra*, "there is no magic in the words [residuary legatee] themselves." Hence courts in construing the term look at the whole of the will, or in other words at the context, for the purpose of getting at the real meaning of the testator. The fact that the will disposes specifically of any real estate is a circumstance of considerable weight, especially when considered in connection with any language in the will, at the beginning or elsewhere, indicating an intention to dispose of the testator's whole estate, or indicating that the real and personal estate constitute a common fund. *Pitman* v. *Stevens*, 15 East, 505. *Davenport* v. *Coltman*, 9 M. & W. 481. *Evans* v. *Crosbie*, 15 Sim. 600. *Laing* v. *Barbour*, 119 Mass. 523. A good illustration of the subtle distinctions upon which the decision whether the residuary legatee takes the real as well as the personal estate depends is found in the two cases of *Hughes* v. *Pritchard*, 6 Ch. D. 24, 27, and *In re Methuen & Blore's Contract*, 16 Ch. D. 696, the opinions in both of which cases are given by Jessel, M. R. In one it is held that real estate passed to the legatee, and in the other that it did not. See also *Martin* v. *Harding*, [1907] 1 Ch. 465.

It becomes necessary to look into this will and the circumstances under which it was made. The testator was evidently somewhat advanced in years. He had no wife, and his only heirs at law were the petitioner and the respondent, each an

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adopted daughter. The relations between the testator and the petitioner had not been cordial for more than twenty years, and for that time there had been no communication between them. "She had not visited him nor had he visited her." The relations between the testator and the respondent had continued most cordial to the time of his death. She and her family spent their summers with him at his home in Rockport in this State, and he often visited her at her home in New Jersey.

He was possessed of considerable property: his personal estate amounting to about $140,000, and the real estate consisting of his homestead with thirty acres of land, also the "Ox Pasture" of forty acres, also the land involved in this suit, the last being of the estimated value of $25,000.

Thus situated the testator decides to make his will. It does not appear that he was a lawyer, or that he had had any special instruction as to the technical meaning of the terms he was about to use. He takes a printed blank form and unaided goes to work. After providing for the payment of his debts, he first creates a trust fund of $65,000 for the benefit of his two adopted daughters (who share unequally however) and other persons therein named. He then makes several other bequests of personal property. Then comes the following: "5th my residence and accompanying buildings and the lot of land on which said buildings are located about thirty acres, also the lot of land known as the Ox Pasture of about forty acres, all to be offered to the Town of Rockport for hospital and Park purposes." "After all of the above" comes (6th) a bequest of a fund of $10,000 for "worthy, indigent students." He then bequeaths his clothing to his brother Joseph, and his furniture and jewelry to his "daughter Louise," the respondent.

The last clause is as follows: "I hereby name and constitute my adopted daughter Louise Haskins Canfield as my residuary legatee — the amount to remain as a trust fund during her lifetime — the income payable to her quarterly."

What did he mean by "residuary legatee"? Did he intend that the residuary legatee should take only the residue of the personal estate, or that she should take that of the real estate as well? On the one hand it is argued that there is a presumption that a testator intends to dispose of his whole estate, that a partial

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intestacy is not to be presumed; on the other hand it is argued that, *prima facie*, by the term "residuary legatee," only personal property passes to the person designated.

It is to be observed in the first place that the testator, being possessed of both real and personal estate, does not confine himself to the disposition of his personal estate. He is thinking of his real estate also and he specifically disposes of a substantial part of it. It is not necessary to decide whether that is of itself enough to show that when he used the term "residuary" he included the rest of his real estate as well as his personal estate, for we are of opinion that while the testator does not expressly state his intention to dispose of all his estate, as in *Laing* v. *Barbour*, 119 Mass. 523, still there is enough in the will, when taken in connection with the express devise of a part of his real estate, to show that he intended the remainder of his real estate to pass to the residuary legatee. By the express language of the will, certain portions of the first trust fund created are upon the death of the life beneficiaries to revert to "my general estate." By this term he must have meant all this estate not specifically devised. He had in his mind not only the undevised personal estate, but also the undevised real estate. He evidently regarded his general estate, both real and personal, as one common fund. In his mind it was all one estate.

The question is not free from difficulty, but, in view of the considerations above named, the fact that the testator was a layman and the evident care and thoroughness with which he proceeded to dispose of his property, we are of opinion that his intention when he wrote the last paragraph was that the real as well as the personal estate should pass to the residuary legatee. It was all "general estate," and was all to go the same way.

Exceptions overruled.

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CITY OF NEWBURYPORT *vs.* FIDELITY MUTUAL LIFE INSURANCE COMPANY.

Suffolk. November 20, 1907. — February 29, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Bills and Notes. Municipal Corporations. Agency. Insurance, Life. *Contract*, Implied. *Interest.*

One who receives the check of a city in payment of an individual debt of its city treasurer has notice on the face of the transaction that in the absence of express authority the check is invalid, and this is so irrespective of the existence of an ordinance prohibiting such an act.

In an action by a city against a life insurance company for money had and received by the defendant in successive annual payments of premiums, upon an individual life insurance policy of the treasurer of the city, made with checks of the city drawn by the treasurer, if it appears that the checks were made payable to the cashier of the defendant, who received them knowing that the insured was the treasurer of the city and indorsed and deposited them to the credit of the defendant in the ordinary course of business, this shows actual knowledge by the cashier that the checks were invalid, and is the knowledge of the defendant, whose alleged right to hold the payments is based on the ratification of its cashier's acts, so that the provision of R. L. c. 78, § 78, that the holder of a negotiable instrument to be chargeable with notice of a defect in the title of the person negotiating it must have had actual knowledge of such infirmity, does not help the defendant.

In an action by a city against a life insurance company for money had and received by the defendant in successive annual payments of premiums, upon an individual life insurance policy of the treasurer of the city, made with checks of the city drawn by the treasurer, the transaction showing that the defendant had actual knowledge that the checks were invalid, if it appears that the wrongful payments were a part of an extensive scheme of embezzlement carried on successfully by the city treasurer for six years, the failure of the auditing officers of the plaintiff to detect the embezzlement, even if they were negligent, is no defense to the action.

In an action by a city against a life insurance company, to recover the amount of premiums paid annually in six successive years on an individual life insurance policy of the city treasurer by checks of the city wrongfully drawn by the treasurer and payable to the defendant, it is no defense that the defendant is a mutual company and that before the action was brought it in good faith distributed the money received as premiums among its policy holders, and has on hand no money received from the plaintiff.

In an action by a city against a life insurance company, to recover the amount of premiums paid annually in successive years on an individual life insurance policy of the city treasurer by checks wrongfully drawn by the treasurer and payable by the defendant, where the receipt of the checks by the defendant shows

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actual notice of their invalidity, evidence offered by the defendant as bearing upon the question of constructive notice properly is excluded as immaterial.

In an action by a city against a life insurance company, to recover the amount of premiums paid annually in successive years on an individual life insurance policy of the city treasurer by checks wrongfully drawn by the treasurer and payable to the defendant, where the receipt of the checks by the defendant shows actual notice of their invalidity, it is no defense to the action "that if the defendant should attempt to inquire into all checks which are received by it from the holders of policies for the payment of premiums, which are not issued in the name of the insured, it could not carry on its business, as such inquiry was a practical impossibility," and evidence offered to prove the truth of such a statement should be excluded.

In an action by a city against a life insurance company to recover the amount of premiums paid annually for six successive years on an individual life insurance policy of the city treasurer by checks of the city wrongfully drawn by the treasurer and payable to the defendant, the plaintiff on proving such knowingly wrongful receipts of its money shows a duty on the part of the defendant to return the amount of each payment as soon as made and without a demand by the plaintiff, and the plaintiff is entitled to interest from the date of each payment.

CONTRACT for money had and received to recover the amount of six checks of the city of Newburyport, the plaintiff, drawn without authority from the plaintiff's bank account by its treasurer and paid to the defendant in six successive years as premiums upon a life insurance policy of such treasurer, with interest thereon from the dates of the respective payments. Writ dated July 6, 1906.

In the Superior Court the case was heard by *Holmes*, J., without a jury, upon an agreed statement of facts and certain offers of evidence made by the defendant. By the agreed facts it appeared that one Felker was the treasurer and the collector of taxes of the plaintiff from 1883 until some time in May, 1906. For at least ten years the plaintiff has had a bank account in the First National Bank of Boston, and at the same time had an account in a Newburyport bank. In the year 1900 this account was in the Ocean National Bank. Since that year it has been in the First National Bank of Newburyport. During this period the city has had no other bank accounts. These bank accounts were established under the authority of the city, and the form of the checks likewise was adopted by the authority of the city. The treasurer had authority to issue a check against one of these accounts to make a proper payment out of the city treasury, upon the written order of the mayor, as provided in the city

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ordinance, which provided, among other things, as follows: "Sec. 5. No money shall be drawn out of the city treasury, except on the written order of the mayor, addressed to the treasurer and countersigned by the city clerk."

The defendant is a mutual life insurance company formed under the laws of the State of Pennsylvania and with its main office in Philadelphia, Pennsylvania. It has an office for this vicinity in Boston under the direction of a manager or general agent. It does business strictly on the mutual plan for the benefit of its policy holders alone. It has no stock or other proprietary interests other than those of its policy holders, for whose benefit it holds all its funds.

Felker had a life insurance policy in the defendant company, the premiums thereon falling due annually on July 18 in each year. The plaintiff had no interest in this policy, which was entirely a personal matter of Felker. The six premiums falling due from July 18, 1900, to July 18, 1905, inclusive, Felker paid by means of checks drawn upon one of the bank accounts of the plaintiff payable in each instance to "F. M. White, Cashier." These checks were mailed by Felker as the different premiums became due to the Boston office of the defendant, without any statement or comment.

F. M. White has been during the past eight years the cashier of the defendant at its Boston office, and she received the checks, indorsed them and deposited them to the credit of the defendant as she did all checks received in the course of business. They were collected in due course. No officer of the defendant nor any person connected with it outside of the Boston office ever saw these checks. They were received in the mail at that office in the same manner as many other checks which are received daily in payment of premiums upon life insurance policies. They were deposited with the other checks which were received in the usual course of business. The agents of the defendant gave no thought to the general transaction further than to get the amount due it for premiums. During these years an average of about one hundred checks a week was received in the Boston office of the defendant in payment of premiums.

Felker's salary as treasurer and collector of taxes of the plaintiff was $1,850 per annum, which was drawn by him monthly

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in cash, and always was entered upon the city's books. The amount of this salary was unknown to the defendant, but it did know, however, that he was the treasurer of the plaintiff. The defendant did not make any investigation as to Felker's right to pay the premiums upon this policy in the manner in which he did.

So far as it may be material to the issues of this case and subject to the defendant's objection and right of exception, it is likewise agreed as follows:

In May, 1906, it was discovered by the mayor and city auditor of Newburyport that Felker was a defaulter to the extent of $86,800, having embezzled that sum from the city during the preceding seven or eight years. His method had been to use the city's money for the payment of his personal debts or for purposes of private investment, either by means of checks on the city's bank account or by abstracting cash from the drawer in his office. Just before the time of the annual auditing of his books in each year by the city auditor, he borrowed money on a city note or notes, fraudulently issued by him, and applied the money so raised to covering up the deficiency in his cash as city treasurer. These notes purported to be issued in anticipation of taxes and were similar in all respects to the legitimate notes frequently issued by the city. The fraudulent notes formed a long series steadily increasing in amount, all of which have been paid in due course except the last notes in the series, which were five in number, aggregating $80,000, and which were issued in April, 1906. As each fraudulent note fell due it was paid by Felker from the proceeds of a new note, or notes, which were made large enough to cover also the amount of his embezzlement since the date of the previous note.

One Sheffield, the manager of the Boston office of the defendant, testified that he knew that Felker was the treasurer of the plaintiff. He further testified that Felker paid the premiums on his insurance policy through the Boston office of the company by the checks in question. He was permitted to testify *de bene*, subject to such ruling as the judge might make as to the effect of the testimony, that he never received any communication from anybody connected with the city of Newburyport, either the mayor or the auditor or anybody, or from

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anybody outside of the city of Newburyport, to the effect that Felker was using the funds of the city of Newburyport to pay the premiums on his policy; that he had never had called to his attention the ordinances of the city of Newburyport; that he did not know that a payment made by the treasurer out of the city treasury should be authorized by the mayor before it was paid; that he did not know that the mayor of the city of Newburyport did not approve the issuance of the checks referred to in the agreed facts. He testified that all the checks in question were received by the cashier and were deposited to the credit of the company. On cross-examination he testified that he could not say whether or not he saw these checks at the time they were received by his office.

The defendant offered to prove through this witness that it was very common in the course of the defendant's business for it to receive checks in payment of premiums drawn on funds not belonging to the persons making the payments, as, for example, checks from agents on the account of their principals, checks from bank cashiers on the funds of the bank, or checks from corporation treasurers on the funds of the corporation.

It further offered to show that if the defendant should attempt to inquire into all checks which are received by it from the holders of policies for the payment of premiums, which are not issued in the name of the assured, it could not carry on its business, as such inquiry was a practical impossibility.

It further offered to show that all the funds received by it from Felker by means of the checks referred to in the agreed facts had been paid out by the defendant to policy holders holding policies of the same class as that issued to Felker as death claims and otherwise, and that it held in its hands no moneys or reserve fund of any sort against this policy issued to Felker.

The judge excluded the evidence offered in each of the above offers of proof.

Florence M. White, called by the defendant, testified that she was the defendant's cashier, and had been since 1898; that she knew who Felker was, but never saw him; that she knew he was the treasurer of the city of Newburyport; that she never had any trouble about the checks in question; that they went through the banks in the ordinary course of business; that no

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notice ever came to her in any way that Felker was using the funds of the plaintiff improperly, or that the checks were not authorized by the city government of the plaintiff.

On cross-examination she testified that in the ordinary course of business a check which came payable to her order would be indorsed by her, and deposited, without any other officer or agent of the company seeing the check; that, so far as she knew, that is what happened with the checks in question; that she indorsed them and gave them to an office boy or somebody to deposit; that, so far as she knew, nobody else saw the checks except her; that she remembered these particular checks, and thought she remembered observing at the time that they were drawn on the city's account.

At the close of the evidence the defendant asked the judge to find and to rule as follows:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. Upon all the evidence the plaintiff is not entitled to recover the amount of the checks presented in evidence.

3. If the plaintiff is entitled to recover the amount of these checks, it is only entitled to recover interest thereon from the date of the writ.

4. Felker had the general power or authority to issue checks upon the funds deposited in the banks upon which these checks were drawn to make a proper payment out of the city treasury or for a debt of the city. [This finding was made by the judge.]

5. The evidence shows that the defendant took each of these checks in good faith, and it is not, therefore, chargeable with notice of any defect in Felker's authority to drawn any of these particular checks.

6. The form of these checks offered in evidence did not as a matter of law, put the defendant upon its inquiry as to Felker's authority to issue them, and did not actually or constructively charge the defendant with any notice whatsoever of any misuse of the checks by Felker.

7. Even if, at any time, the defendant was chargeable with notice of the misuse of these checks by Felker, or even if the plaintiff could at any time have recovered the amount of any

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one of them from the defendant, the plaintiff has, by the acts, conduct and negligence of its duly authorized officers and agents, ratified the issuing of all of these checks by Felker, and is estopped to recover the amount of any of them from the defendant.

8. The defendant is a mutual life insurance company, and held all the money which it received from Felker by means of these checks in trust for all of its policy holders having policies of the same class as Felker's policy. All this money it paid out in death claims to such policy holders without knowledge of the plaintiff's claim, and, therefore, as it cannot be put *in statu quo*, it cannot be required to pay back the money to the plaintiff.

9. There were no funds of the plaintiff in the hands of the defendant at the time it received notice that the plaintiff claimed the proceeds of these checks. It cannot, therefore, be adjudged a constructive trustee for the plaintiff of any funds whatsoever, and cannot be held liable in this action.

10. The equity of the policy holders of the defendant to the funds sought to be recovered by the plaintiff in this action is superior to the equity of the plaintiff corporation, and the plaintiff cannot, therefore, recover.

The judge granted the fourth request of the defendant, but declined to make the other findings and rulings requested.

The judge found for the plaintiff in the sum of $868.63, being the amount set forth in the declaration, together with interest on each item from the date when it was paid. The defendant alleged exceptions, which, after the death of *Holmes*, J., were allowed, with the consent of the counsel for the plaintiff, by *De Courcy*, J., under R. L. c. 173, § 108.

W. I. Badger & W. H. Hitchcock, for the defendant.

R. G. Dodge & C. W. Blood, for the plaintiff, were not called upon.

HAMMOND, J. The checks were on their face the checks of the plaintiff, a municipal corporation. *Carpenter* v. *Farnsworth*, 106 Mass. 561. The defendant therefore must be held to have known this; and it knew further that they were delivered to the defendant in payment of the individual debt of the treasurer. In short, the defendant knew that it was receiving in payment of the individual debt of the treasurer checks of the municipal

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corporation, and therefore that upon the face of the transaction the treasurer was using the funds of the city to pay his own debt. No citation of authorities is needed in support of the proposition that in the absence of proof of authority on the part of the treasurer such a check is invalid. The payee is charged with notice of a possible want of authority on the part of the agent or officer to bind the principal, and cannot recover upon the check or retain the proceeds without showing that the execution of the paper was duly authorized. And this would be so irrespective of the question whether or not there was an ordinance prohibiting such an act. If there had been no such ordinance the principle would have been applicable. *Prima facie* and on its face the check is issued without authority.

Although it was not made payable to the defendant, yet it was received by a duly authorized agent of the defendant, in payment of a debt due to it, and the proceeds were duly credited to its account; and its right to hold the proceeds is based only upon the ratification of the act of its agent. Under these circumstances the knowledge of its agent is the knowledge of the defendant, and no help for the defendant is found in R. L. c. 73, § 73. There is nothing in *Fillebrown* v. *Hayward*, 190 Mass. 472, relied upon by the defendant, which is inconsistent with this view of the law. Not to mention other material distinctions between that case and this, it is to be remembered that here we are dealing with the acts of a treasurer of a city, who under our law has no authority as such to issue commercial paper. *Abbott* v. *North Andover*, 145 Mass. 484. Compare also *Merchants' National Bank* v. *Citizens' Gas Light Co.* 159 Mass. 505.

There does not appear to have been any ratification on the part of the plaintiff. The facts were not known. The negligence of the auditing officers of the plaintiff, if any there was, is not available as a defense to the defendant.

It is strongly argued by the defendant that before this action was brought it had distributed the money among its policy holders, so that it has now no fund on hand to meet this demand. But the answer is that it took the money with full knowledge of the very infirmity in its title upon which the plaintiff bases the right to recover. It must be held to have paid over at its own risk. In law it held the money for the

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plaintiff, and it cannot relieve itself from responsibility by a division of it among its policy holders.

From the above considerations it follows that as to all the requests for rulings, so far as they respect the question of liability, no error appears in the action of the trial court.

The defendant excepted to the exclusion of certain evidence offered by it. The first offer was properly excluded. The evidence was offered as bearing upon the question of constructive notice. But it could not affect the question of actual notice in this case and was immaterial. The exception arising upon the second offer was waived.

As to the third offer, which was to prove that "if the defendant should attempt to inquire into all checks which are received by it from the holder of policies for the payment of premiums which are not issued in the name of the assured, it could not carry on its business, as such inquiry was a practical impossibility," the answer would seem to be that, if the defendant cannot carry on its business under the general laws of the land without risk, it had better conclude, not that the law is to be changed for its particular benefit, but that it must either assume the risks or stop the business.

The subject contained in the fourth offer has been covered, and no further comment need be made on it. The judge properly excluded all the evidence contained in the four offers.

There remains the question of interest. The defendant received the money of the plaintiff in payment of the individual debt of the treasurer. It knew this. Such a reception of the money was a fraud upon the plaintiff. The money was wrongfully received, and with notice of the defect in the title. It was the duty of the defendant to return it where it belonged, and that without a demand by the plaintiff. Under these circumstances interest should be charged from the time when the money was received. *Dodge* v. *Perkins*, 9 Pick. 368, and cases there cited. *Atlantic National Bank* v. *Harris*, 118 Mass. 147. *Wood* v. *Robbins*, 11 Mass. 504. *Gale* v. *Chase National Bank*, 104 Fed. Rep. 214. *Reynolds Elevator Co.* v. *Merchants National Bank*, 55 App. Div. (N. Y.) 1. *Rogers* v. *Betterton*, 93 Tenn. 630.

Exceptions overruled.

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INDEX.

ABSENTEE.

Provisions of R. L. c. 144, §§ 10, 11, with regard to distribution of property of absentee when fourteen years have elapsed since disappearance, are constitutional, see CONSTITUTIONAL LAW, 3.

ABUSE OF LEGAL PROCESS.

At the trial of an action of tort for falsely procuring the plaintiff, a resident of another State, to come within this Commonwealth for the purpose of causing his arrest on mesne process in an action of contract, and then arresting him, there was evidence tending to show that the defendant resided in Attleboro in this Commonwealth, and that the plaintiff and the defendant had an appointment on a certain day in Providence in the State of Rhode Island; that, the day before the appointment, the defendant wrote to the plaintiff stating that he was ill and desired the plaintiff to meet him in Attleboro instead of in Providence and offering to pay the expenses which the plaintiff would incur in doing so; that, on the day of the appointment, in a telephone communication, the defendant again urged the plaintiff to come to him in Attleboro because he was ill and unfit for travel and stated that the plaintiff could arrive on the train leaving Providence at 12.07 P. M. and leave Attleboro again at 12.54 P. M.; that the plaintiff, for accommodation of the defendant, promised to do so; that the defendant, while the plaintiff was on his journey from Providence, made the affidavit and procured the certificate necessary, under R. L. c. 168, § 1, to authorize an arrest of the plaintiff on mesne process, and, after the plaintiff arrived in Attleboro, caused his arrest. The plaintiff testified that, at the time of the interview when the arrest was made, the defendant "did not seem sick so far as he could see." *Held*, that there was evidence warranting the submission of the case to the jury. *Paine* v. *Kelley*, 22.

To "intend to leave the Commonwealth" within R. L. c. 168, § 1, authorizing arrest on mesne process in action of contract, defendant must be within its borders and no valid arrest can be made upon a certificate procured by affidavit that defendant intended to leave Commonwealth unless defendant was within Commonwealth at time when affidavit was made, see ARREST, 1–3.

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ACCORD AND SATISFACTION.

See SEAMAN, 4, 5.

ACTION, SURVIVAL OF.

See HUSBAND AND WIFE, 4; PRACTICE, CIVIL, 8.

ACTIONABLE TORT.

Action of tort for procuring plaintiff by false pretense to enter Commonwealth and there causing his arrest on mesne process upon certificate irregularly obtained, see ABUSE OF LEGAL PROCESS.

Riparian owner has remedy in tort against one who obstructs ditch, which has legal character of natural watercourse and is outlet for surplus water of river in time of flood, thereby causing land to be overflowed, see WATERCOURSE, 3.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

Action of tort allowed to owner of property which although sustaining no present damage will be diminished in value if one causing unlawful obstruction of watercourse acquires, by lapse of time, right to maintain obstruction, see WATERCOURSE, 1.

AGENCY.

Existence of Relation.

1. At the trial of an action for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant in his cotton mill, there was evidence tending to show that the plaintiff was injured while cleaning a carding machine, that the carding machine was being set up in the defendant's mill by one L. under an agreement whereby the defendant was required to furnish "usual laborer's assistance," that the plaintiff was set to work and kept at work on the machine by one acting as superintendent for the defendant and, by order of such superintendent, was instructed in his work by one who was in the employ of L., that the plaintiff did not know that he was working for any one other than the defendant, and had never heard of L., and that he was paid by the defendant. *Held*, that, in order to constitute the plaintiff the servant of L., there must have been such a change in his relations to the defendant that the defendant had ceased for the time being to have any direction over or con-

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trol of him and that L. had become responsible for the discharge of those duties which a master owes to his servant in respect to matters affecting his safety; and that the question whether, at the time of the accident, such a change had occurred was for the jury. *Heffernan* v. *Fall River Iron Works Co.* 28.

In a case where it was contended that agent of liability insurance company must be treated in regard to his dealings with plaintiff as an agent of defendant, the person insured, it was held to be doubtful whether there was evidence which would warrant such a finding, see EVIDENCE, 4.

Evidence held to warrant finding that certain person was not agent of defendant insurance company to effect sort of insurance in question, see INSURANCE, 7.

Scope of Employment or Authority.

2. A firm who were engaged in the express business in Cambridge and Boston received, on a contract limiting liability to $50, goods worth $200 consigned to a person in Cambridge, and lost them in transportation. The consignee had a conversation with one who was an agent in charge of the express firm's business in Cambridge, who told him, in substance, to replace the goods and "he would settle for it." The consignee replaced the goods, but the express firm refused to reimburse him, and he brought an action of contract against the members of the firm to enforce the agreement, at the trial of which before a judge without a jury, the judge found the following facts: The defendants had purchased the business from the father of the agent who made the promise to the plaintiff, who, before the purchase, had managed the business for his father, and whom the defendants had kept in their employment as agent in charge of the Cambridge business. The name under which the business was done by the agent's father had remained unchanged, but his authority as agent for the defendants to settle claims was limited to claims not larger than $3. The plaintiff, however, at the time of the promise of the agent, did not know of the sale of the business by the agent's father to the defendants, nor of the limitation of the agent's authority. The judge refused to rule that, because he did not know that the agent was acting for the defendant but thought he was acting for the agent's father, the plaintiff was bound by the agent's actual authority; but he did rule that the promise of the agent was within his ostensible authority and that the plaintiff was not bound by the limitation of authority of which he did not know. *Held*, that the rulings and refusal to rule were correct, since, after the existence of an agency, whether undisclosed or disclosed, is found, the rule that, to one who has no notice of a limitation of the agent's authority, the principal is responsible for all acts of the agent within the apparent scope of his authority, applies. *Brooks* v. *Shaw*, 376.

3. At the trial of an action of replevin for certain machines, a question at issue was whether the plaintiff had given to one to whom he had leased the machines authority, after a fire in the lessee's factory in which the machines were damaged, to sell them as junk, and there was evidence,

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introduced by the defendant but controverted by the plaintiff, tending to show that the lessee had a conversation with one W., in which he was told that, if one S., after examination of the machines on behalf of the plaintiff, told the lessee that they were worthless, the lessee might sell them as junk. The plaintiff was a corporation and W. was its assistant general manager. There was evidence that his "duties were not prescribed," but were "looking after the general management of the business," and there was testimony of W. and admissions of the plaintiff tending to show that he had authority from the plaintiff to do whatever he did in the transaction with the lessee. The defendant, after introducing evidence of S.'s examining the machines, was then allowed, subject to exception by the plaintiff, to show that S. said to the lessee that he did not think that the machines were of any value, the presiding judge admitting the testimony "only so far as it was within the scope of the authority given by W." *Held*, that there was evidence that W. had authority to delegate authority to S., that he had done so, and that S. had acted within the authority thus delegated to h'm; and, therefore, that the evidence objected to was admissible. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

Statement of superintendent as to responsibility for accident excluded as not within scope of his authority, see EVIDENCE, 9.

One who receives check of city in payment of individual debt of city treasurer has notice on face of transaction that, in absence of express authorization, check is invalid, see BILLS AND NOTES, 6.

Teamster sent to deliver coal who uses coal hole in pursuance of directions of customer acts in so doing within scope of employment by coal dealer who is responsible for his negligence in leaving coal hole open and unguarded, see NEGLIGENCE, 42.

Knowledge of Agent as Knowledge of Principal.

Where invalid check given in payment of insurance premium was made payable to cashier and by him indorsed and deposited to credit of company in usual course of business, knowledge of invalidity which cashier is found to have had on face of transaction was held to have been actual knowledge on part of the company, see BILLS AND NOTES, 6, 7.

Double Employment.

For evidence which was held to raise question for jury whether one sent by owner of mill to assist in setting up of machine by third person was at time of accident the servant of mill owner or of such third person, see *ante*, 1.

For Undisclosed Principal.

Application of rule that, where there is agency disclosed or undisclosed, principal is responsible for all acts of agent within apparent scope of authority to one who has no notice of a limitation of agent's authority, see *ante*, 2.

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APPEAL.

The first Monday in every month is the day for the entry of appeals in the Superior Court and the Supreme Judicial Court. *Reardon* v. *Cummings*, 128.

In divorce proceedings, see MARRIAGE AND DIVORCE, 1–4.

In equity, see EQUITY PLEADING AND PRACTICE, 4.

To Superior Court by creditor of insolvent estate of deceased person, from report of commissioners to Probate Court, see PRACTICE, CIVIL, 20–22.

ARBITRAMENT AND AWARD.

Where, by the terms of a contract for the sale of land, the purchase price is to be "agreed upon and fixed" by three disinterested persons, one to be chosen by each of the parties to the contract and the third by the two so chosen, and there is no provision in the agreement as to the effect of an award by a majority of the three, such an award by a majority is not valid or binding upon the parties to the agreement. *Washburn* v. *White*, 540.

One who has option to purchase real estate at price to be fixed by arbitrators may lose rights under contract by failure to endeavor in good faith to have arbitrators appointed and price fixed within reasonable time, see EQUITY JURISDICTION, 2.

ARREST.

On Mesne Process.

1. The provisions of R. L. c. 168, § 1, with regard to arrest on mesne process in an action of contract, are not to be extended by construction. *Paine* v. *Kelley*, 22.
2. A defendant must have been within the borders of the Commonwealth in order to have an intention "to leave" it within the meaning of R. L. c. 168, § 1, authorizing his arrest on mesne process if the plaintiff makes affidavit before a magistrate that the defendant "intends to leave the Commonwealth, so that execution, if obtained, cannot be served upon him." *Ibid.*
3. An affidavit, that a defendant is about to leave the Commonwealth so that execution, if obtained, cannot be served upon him, made before a magistrate under R. L. c. 168, § 1, for the purpose of procuring a certificate to be attached to a writ authorizing his arrest on mesne process in an action of contract, is false if, at the time when it is made, the defendant is not within the Commonwealth, although at that time he is on a journey hither and intends, after a stay of less than an hour, again to leave. *Ibid.*

Action of tort for procuring plaintiff by false pretense to enter Commonwealth and there causing his arrest upon mesne process in action of contract, the affidavit required by R. L. c. 168, § 1, having been made while plaintiff was still without the Commonwealth, see ABUSE OF LEGAL PROCESS.

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ASSAULT AND BATTERY.

If, with the permission of the owner of a building, a mortgagee of personal property of a bankrupt who has a shop in the building enters the shop, when the trustee in bankruptcy of the estate of the mortgagor appears, and says that he will try to put him out of the shop, and the two wrestle with each other for some time, but the trustee in bankruptcy, being unable to put out the mortgagee, leaves without doing it, and the mortgagee suffers no injury, this gives the mortgagee a right of action against the trustee in bankruptcy for nominal damages for assault and battery in having used force on the person of the mortgagee against his will and without justification of law. *Wood* v. *Cummings*, 80.

Questions of specification of time of assault and of divergence in proof offered at second trial as to time from that introduced at first trial, see PRACTICE, CIVIL, 4, 9.

ASSESSMENT.

See TAX.

ASSIGNMENT.

Of Future Earnings.

Under St. 1905, c. 308, which provided that "no assignment of future earnings, whether made by the assignor in person or by his attorney, shall be valid unless executed in writing, for a period not exceeding two years from the date of said assignment or of any power of attorney under which said assignment is made," an assignment made February 23, 1906, of wages to be earned by a wage earner up to April 20, 1907, purporting to be executed in behalf of the wage earner by one acting pursuant to authority assumed to have been conferred by a power of attorney to do so which was executed by the wage earner on December 5, 1904, was invalid because it purported to assign earnings for a period exceeding two years from the date of the power of attorney. *McCallum* v. *Simplex Electrical Co.* 388.

St. 1905, c. 308, is constitutional, see CONSTITUTIONAL LAW, 4.

ATTACHMENT.

Creditor of husband of woman doing business without filing certificate required by R. L. c. 153, § 10, can attach her property although he knew all the facts and was not deceived by failure to file certificate, see HUSBAND AND WIFE, 2.

ATTORNEY AT LAW.

Disbarment.

1. A material question at the hearing on a petition for the disbarment of an attorney at law was whether a charge of $3,600 made by the attorney to

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a client for services was proper. The respondent was employed by the client, a married woman, to obtain for her either separate maintenance or a divorce from her husband, and had paid nothing to the respondent as a retainer or on account of disbursements to be made, although she gave him security worth $250. The respondent testified that he spent one hundred and fifty-four days of six hours each on the case during a period of two years, and that finally by the use of detectives he procured evidence of adultery on the part of the client's husband and other evidence by the use of which he was able to compel the father of the client's husband, the husband being without financial resources, to pay to the client $7,700 and to undertake to maintain and educate the client's two minor children, and also was able to procure a divorce without a contest. He further testified that the case was unusually difficult because of habits of drinking and of resorting to questionable places on the part of the client, and it appeared in evidence that, when complaint was made to a committee of the bar association by the client, the respondent, in order to prevent proceedings, threatened that he would make public certain misconduct (meaning sexual immorality) of hers. The client testified that she did not drink to excess and that she was not guilty of misconduct. Witnesses, qualified as experts, testified that in their opinion the charge of the respondent for his services as stated by him was reasonable. The presiding judge found that the charge was unreasonable and excessive. *Held*, that the presiding judge was not bound to believe the evidence produced by the respondent, and that the finding would not be disturbed. *Boston Bar Association* v. *Hale*, 423.

2. Where evidence introduced at the hearing of a petition for the disbarment of an attorney at law tends to show that, after a complaint to the grievance committee of a bar association by a woman who was a client of the attorney and had been charged an excessive and unreasonable fee for services by him, the attorney had interviewed the secretary of the committee and then had written to the client that, if she did not retract her statement that he had procured from her a note for the amount of the services by fraud, he would "make a statement of the increased difficulties I had in handling your affairs owing to your own misconduct," and that he also had made a similar statement to the secretary as to the client's "misconduct," but that the client had been guilty of no misconduct and that the attorney had no evidence of any, findings by the presiding judge that by "misconduct," the attorney meant "sexual immorality," and that the attorney was guilty of unprofessional conduct in making the threat were warranted. *Ibid.*

3. A finding by the judge presiding at the hearing of a petition for the disbarment of an attorney at law, that a promissory note given by a woman client to the respondent, while the confidential relation of attorney and client still existed, in payment of his charge for services already rendered by him, was not procured by the respondent with the fraudulent intent of obtaining money from her under the pretense that it was due to him for services, does not preclude the presiding judge from finding that the charge for services was unreasonable and excessive and that the respond-

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ent was guilty of unprofessional conduct in making it. *Boston Bar Association* v. *Hale*, 423.

ATTORNEY GENERAL.

St. 1906, c. 463, Part I. § 8, providing that if a railroad corporation or street railway company, in the opinion of the board of railroad commissioners, has violated a law or neglects to comply with the terms of a statute, and continues to do so after notice from them, they shall present the facts to the Attorney General for his action, does not limit the authority of the Attorney General to bring independently proper proceedings to restrain unauthorized or illegal acts of such a corporation in any case where the interests of the public seem to him to require that he should do so. *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 194.

Case involving jurisdiction of Supreme Judicial Court under St. 1906, c. 372, upon information in equity in name of Attorney General at relation of commissioner of corporations, to restrain domestic corporation from exercising privileges not granted by charter, where case is not so serious as to call for forfeiture of charter, see CORPORATION, 2.

And therewith discussion of the law as it was before that statute was passed with reference to proceedings in nature of quo warranto, see CORPORATION, 1.

AUDITOR.

Under R. L. c. 201, as amended by St. 1905, c. 370, giving Superior Court "jurisdiction of all claims at law or in equity against the Commonwealth," there is no authority to appoint an auditor, see PRACTICE, CIVIL, 1.

AUTOMOBILE.

At the trial of an action of tort against a town under R. L. c. 51, § 18, for damage to the plaintiff's automobile alleged to have been caused by a defect in a highway, it appeared that the plaintiff was travelling upon the way in an automobile, but there was no evidence introduced either by the plaintiff or by the defendant that he was licensed to operate an automobile or that the automobile was registered as required by Sts. 1903, c. 473; 1905, c. 311. *Held*, that, while, if it had appeared affirmatively that the plaintiff was travelling on the highway without either the registration of or the license to operate the automobile which were required by the statutes, he would have been without remedy, in this case, there being no proof of such violation of law by him, he was to be presumed to have been innocent thereof and to have been using the way lawfully. *Doherty* v. *Ayer*, 241.

Automobiles are not "carriages" within R. L. c. 51, § 1, and if city or town keeps way safe for travel by horse drawn vehicles, it is not required to make special provision for automobiles, see WAY, 3–5.

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BAIL.

Where woman arrested on mesne process in action of tort has given bail bond, she is bound, after final judgment has been obtained against her, to present herself where demand for payment can be made, and if she cannot be found for purpose of such demand, it is breach of bond, see BOND, 1.

In case of such breach, scire facias is a proper remedy, see BOND, 2.

BANKRUPTCY.

1. Where a trustee in bankruptcy has taken possession of the shop of the bankrupt and its contents and has locked the door of the shop and kept the key, this brings the property of the bankrupt in the shop within the jurisdiction of the court of bankruptcy, and one holding a mortgage on property of the bankrupt in the shop, who has become a party to the proceedings in bankruptcy, cannot obtain a revision of a decree of that court by bringing an action against the trustee in bankruptcy in a court of this Commonwealth for an alleged conversion of the property. *Wood* v. *Cummings*, 80.
2. The holder of an unrecorded mortgage of land cannot claim the land as against the trustee in bankruptcy of the mortgagor on the ground that the mortgage creates a trust, for, if it does, an unrecorded trust concerning land, under R. L. c. 147, §§ 1–3, is of no more effect than an unrecorded mortgage. *Putnam* v. *Southworth*, 270.
3. In a suit in equity by a trustee in bankruptcy against the wife and the father of the bankrupt, to recover certain real estate conveyed by the bankrupt, about eleven months before his adjudication in bankruptcy, through a third person to his wife and mortgaged by her to the father of the bankrupt about two weeks before that adjudication, the judge who heard the case found that the conveyance was made by the bankrupt to his wife when he was insolvent with the intent on his part to hinder, delay and defraud his creditors, that the conveyance was a voluntary one without consideration, and that the mortgage by the wife to the father, purporting to secure the payment of a certain sum of money, also was made voluntarily either because the father held an unpaid debt against the bankrupt or for some other reason. The mortgage was not recorded until two days after the adjudication in bankruptcy. The judge found that the mortgagee did not participate in the bankrupt's fraud and acted in good faith. *Held*, that the deed to the wife being intended by the grantor to defraud his creditors and being without consideration was voidable by his creditors when it was made and by the trustee in bankruptcy after his appointment, and that under R. L. c. 127, § 4, as the mortgage was not recorded at the time of the adjudication in bankruptcy, the land "might have been levied upon and sold under judicial process" by the bankrupt's creditors as having been conveyed to his wife in fraud of creditors, and so under § 70 a, 5, of the bankruptcy act of 1898 it passed to the trustee in bankruptcy upon his appointment. *Ibid.*

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4. One who was lessee under separate leases of two different buildings deposited with the lessor a sum of money to secure to him the payment of the rent, and then assigned his lease of one of the buildings to a partnership of which he was a member. Rent was payable under both leases in advance on the first day of each month, and, it not having been paid under either lease on the first day of a certain month, the lessor gave proper notice to the partnership and entered upon the premises then held by them, but ousted the lessee from the other building on the fourth day of the month. On the twelfth day of the month the lessee filed a petition in bankruptcy under the bankruptcy act of 1898, and a trustee subsequently was appointed. Thereafter the partnership paid the rent due under the lease assigned to them, and the trustee in bankruptcy brought an action to recover the amount of the deposit made with the lessor by the lessee. *Held*, that the trustee in bankruptcy on his appointment became vested with the right, which was the lessee's at the time he filed his petition in bankruptcy, to enforce repayment of the deposit when all instalments of rent whose payment it secured were paid. *Hall* v. *Middleby*, 485.

See also INSOLVENCY.

BAR ASSOCIATION.

Disbarment proceedings instituted by bar association, see ATTORNEY AT LAW.

BETTERMENT.

See TAX.

BILLS AND NOTES.

Instrument delivered on Sunday.

1. A check on a bank delivered on Sunday by the drawer to the payee in payment of a debt contracted by the drawer on a secular day and accepted by the payee as such payment is invalid and of no effect in the hands of the payee; but, if the payee receives payment of the check from the bank or value for it from one to whom he negotiates it, he cannot again collect the debt from the drawer. *Gordon* v. *Levine*, 263.
2. If the drawer of a check upon a bank delivers it to the payee on Sunday and the payee on a secular day negotiates it by indorsement for value to one who has no notice of the fact that it was delivered to the payee on Sunday, the check thereby becomes a valid check in the hands of the indorsee. *Ibid.*

See also *post*, 5.

Payment.

3. At the trial of an action of contract upon a promissory note by the payee against the maker, it appeared that, at the time when the note was delivered, the defendant held by assignment the interest of a beneficiary under a trust, and that, contemporaneously with the delivery of the note, he gave to the plaintiff an order on the trustee for its amount. The

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plaintiff gave the order and the note to the trustee, and it appeared that thereafter the trustee had in his possession funds which he could have applied in payment of the note. The defendant contended that the foregoing facts showed a payment of the note. It did not appear either that the trustee accepted the order or applied funds of the beneficiary to the payment of the note. *Held*, that there was no evidence of payment to submit to the jury. *Austin* v. *Papanti*, 584.

Part Payment avoiding Bar of Statute of Limitations.

4. At the trial of an action upon a promissory note by the payee against the maker, the defense relied upon was that the period of limitation had passed. Upon the back of the note was indorsed a payment with a date within a time less than the statutory period before the action was brought, and the plaintiff, subject to exception by the defendant, testified that the indorsement was written upon the note by him in the presence of the defendant, who saw it made and who at the same time paid to the plaintiff the amount stated in the indorsement to have been paid. The defendant contended that the case was within the provisions of R. L. c. 202, § 13, that no indorsement of a payment of the principal or interest of a note, written on the note by the party to whom such payment had been made, should be sufficient proof of the payment to take the case out of the provision of the statute of limitations. *Held*, that, there being other evidence sufficient to prove the payment besides the indorsement, the statute did not apply. *Mitchell* v. *Thomas*, 347.

Negligence of Holder.

5. At the trial of an action of contract for money alleged to have been lent to the defendant by the plaintiff, it appeared that the money was lent as alleged on a secular day, that the defendant, who was of Boston, drew a check dated on a Saturday upon a Boston bank payable to the plaintiff, and on Sunday delivered it to the plaintiff, who was of Chelsea, in payment of the debt, and that the defendant accepted it as such payment and negotiated it on Monday to one from whom he received its full face value. No presentment of the check was made until Friday at a time after the bank upon which it was drawn had failed, it having failed on that day. The plaintiff thereupon returned to the person to whom he had negotiated the check the money he had received therefor. From the time when the check was drawn to the time when the bank failed, there were funds of the defendant in the bank sufficient to pay it. The plaintiff requested the presiding judge to rule, "If the check was delivered on Sunday, it was invalid and of no legal effect, and the plaintiff is entitled to recover on his count for money lent." The presiding judge refused to rule as requested and found for the defendant, and the plaintiff excepted. *Held*, that, since the presiding judge might have found either that the plaintiff had received the amount called for by the check, or that he might have received it but for his own neglect, he was not bound to give the ruling requested. *Gordon* v. *Levine*, 263.

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Notice to Taker of Invalidity.

6. One who receives the check of a city in payment of an individual debt of its city treasurer has notice on the face of the transaction that in the absence of express authority the check is invalid, and this is so irrespective of the existence of an ordinance prohibiting such an act. *Newburyport* v. *Fidelity Ins. Co.* 596.
7. In an action by a city against a life insurance company for money had and received by the defendant in successive annual payments of premiums, upon an individual life insurance policy of the treasurer of the city, made with checks of the city drawn by the treasurer, if it appears that the checks were made payable to the cashier of the defendant, who received them knowing that the insured was the treasurer of the city and indorsed and deposited them to the credit of the defendant in the ordinary course of business, this shows actual knowledge by the cashier that the checks were invalid, and is the knowledge of the defendant, whose alleged right to hold the payments is based on the ratification of its cashier's acts, so that the provision of R. L. c. 73, § 73, that the holder of a negotiable instrument to be chargeable with notice of a defect in the title of the person negotiating it must have had actual knowledge of such infirmity, does not help the defendant. *Ibid.*
8. In an action by a city against a life insurance company, to recover the amount of premiums paid annually in successive years on an individual life insurance policy of the city treasurer by checks wrongfully drawn by the treasurer and payable by the defendant, where the receipt of the checks by the defendant shows actual notice of their invalidity, evidence offered by the defendant as bearing upon the question of constructive notice properly is excluded as immaterial. *Ibid.*
9. In an action by a city against a life insurance company, to recover the amount of premiums paid annually in successive years on an individual life insurance policy of the city treasurer by checks wrongfully drawn by the treasurer and payable to the defendant, where the receipt of the checks by the defendant shows actual notice of their invalidity, it is no defense to the action "that if the defendant should attempt to inquire into all checks which are received by it from the holders of policies for the payment of premiums, which are not issued in the name of the insured, it could not carry on its business, as such inquiry was a practical impossibility," and evidence offered to prove the truth of such a statement should be excluded. *Ibid.*

Mortgage Note.

Where mortgagor conveys equity of redemption to one who takes subject to mortgage but does not assume mortgage debt, and, by reason of binding agreement between mortgagee and purchaser to which mortgagor does not assent, mortgagee delays foreclosure after maturity of mortgage, this operates to release mortgagor from liability upon mortgage note to extent of any depreciation in value of land between maturity of mortgage and date of foreclosure, see MORTGAGE, 1.

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BOND.

Bail.

1. A woman who has been arrested on mesne process in an action of tort and has given a bail bond conditioned to abide final judgment and "not avoid," after judgment has been obtained against her and execution has issued thereon with no *capias* clause, is bound to present herself where demand for the judgment debt can be made upon her, so that if she fails to pay the debt the judgment creditor may proceed against her by petition for her examination, and if after diligent search she cannot be found for the purpose of such a demand it is an avoidance and a breach of her bond. *Brooks* v. *Reynolds*, 94.
2. *Scire facias* under R. L. c. 169, §§ 7, 8, is a proper remedy for the breach of a bail bond given by a woman arrested on mesne process in an action of tort, although there also is a remedy by an action of contract under R. L. c. 168, § 66. *Ibid.*

To prosecute Writ of Review.

Declaration upon bond to prosecute writ of review which contains averment that principal failed to prosecute writ to final judgment and has not satisfied the judgment against him states a cause of action, see PLEADING, CIVIL, 2.

Required by Unconstitutional Statute.

If bond is invalid because of unconstitutionality of statute by which it was required to be given, question may be raised in any action on bond and decision that bond is invalid may be pleaded in bar of any and all other actions upon it, see EQUITY JURISDICTION, 1.

BOSTON.

By Revised Ordinances of Boston of 1883, c. 24, § 3, and Revised Ordinances of 1895, c. 26, § 1, enacted under authority of St. 1885, c. 323, the board of police commissioners of that city were given the powers formerly vested in the board of aldermen or the mayor and aldermen in relation to licensing, regulating and restraining hawkers and pedlers, carriages, wagons and other vehicles, and such a license given in 1894 by the board of aldermen was of no effect. *Commonwealth* v. *Morrison*, 199.

Petition for writ of certiorari to quash proceedings of board of street commissioners assessing benefits upon estates abutting on Columbia Road in Boston, denied, see TAX, 6–8.

BOSTON ELEVATED RAILWAY.

Under St. 1906, c. 520, authorizing the Boston Elevated Railway Company to construct a subway or subways in the city of Cambridge, the mayor of Cambridge has no part in determining the number of stations in the sub-

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way. His only authority in regard to stations is given by § 13 of the act, which provides for his approval of locations of the "subway stations at convenient points, with suitable exits and approaches to and from the streets and such stations," referring only to the exact location and manner of construction of the stations which are to be built under a plan of the railway company which has received the approval of the railroad commissioners, and the determination of the mayor in regard to the matters which are to be approved by him being made subject by § 14 to revision by the railroad commissioners "if such determination when made is not satisfactory to the company." *Mayor of Cambridge* v. *Railroad Commissioners*, 574.

CAMBRIDGE.

As to authority of mayor of Cambridge with regard to stations in subway to be constructed under St. 1906, c. 520, see BOSTON ELEVATED RAILWAY.

CARRIER.

Of Passengers.

Where a corporation operating a railroad has provided a safe way of exit from its grounds for passengers arriving at one of its stations, it is the duty of such a passenger to use the way provided, and if knowingly, without any invitation express or fairly to be implied from the situation and arrangement of the station and grounds, he leaves the way marked out by the carrier and proceeds to make his exit in some other way, he ceases to be a passenger and becomes a trespasser or at the most a mere licensee. It makes no difference that he goes where others, with the knowledge of the carrier, have gone before him unless there is an invitation express or implied on the part of the carrier. *Legge* v. *New York, New Haven, & Hartford Railroad*, 88.

It is duty of railway to keep stairways by which passengers enter and leave its subway station in reasonably safe condition for travel, see NEGLIGENCE, 19.

For evidence warranting finding of failure so to do, see NEGLIGENCE, 20.

Injury to passenger, see NEGLIGENCE, 19–25, 35.

Injury at railroad station to intending passenger through negligence of express company, see NEGLIGENCE, 32–34.

CERTIORARI.

Writ to quash proceedings of board of street commissioners assessing benefits upon estates abutting on Columbia Road in Boston, denied, see TAX, 6–8.

Writ to quash proceedings of gas and electric light commissioners refusing to order electric light company to serve petitioner, denied, see PUBLIC SERVICE CORPORATION, 3.

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CHARITY.

1. The gift by a testator of the residue of his estate to his executors in trust to convey and transfer it to such institutions or natural persons as they may select, to be held by such institutions or natural persons in trust to be applied by them to charitable objects, is a valid gift to charity. *Gill* v. *Attorney General*, 232.
2. The residuary clause of a codicil was as follows: "All the rest and residue of my estate of every character and description, I give to my executors named in said will, in trust nevertheless to distribute the same among such charitable institutions, persons or objects, in such amounts, upon such terms, and for such purposes, as they decide to be most worthy, having regard, but in their sole discretion, to such as I have been interested in during my life." *Held*, that the word "charitable" qualified "persons" and "objects" as well as "institutions," and that the term "charitable persons" was not used to designate persons of a philanthropic turn of mind, but meant that the persons selected should take the property transferred to them by the executor in trust to be applied by them to objects of charity, which made the gift good as a public charitable trust. *Ibid.*
3. Where a gift is made by will for a specific charity alone and not for a general charitable purpose, if the performance of the specific purpose has become impossible the gift fails and the doctrine of *cy pres* does not apply, and for that reason in the present case it became unnecessary to consider whether the specific purpose set forth in a certain clause in the will, if it had been possible of execution, would have been a charitable one which would make a perpetual trust valid. *Ibid.*

CHILD.

Prosecution for neglect to support minor child, see PARENT AND CHILD.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLAIMANT.

Of money paid into court, see PRACTICE, CIVIL, 26.
Of property attached upon equitable process, see EQUITY PLEADING AND PRACTICE, 2

COMMONWEALTH.

1. A contract made with an officer or agent of the Commonwealth for the construction or repair of public buildings or other public works, which in

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compliance with the requirement of R. L. c. 6, § 77, provides security for the payment by the contractor for labor and materials by the retention of a certain proportion of any payment due to the contractor, gives to a person, who has furnished such labor or materials and has filed a sworn statement of his claim within sixty days after the completion of the work, an equitable interest in the fund held by the agent of the Commonwealth as security. *Burr* v. *Massachusetts School for the Feeble-Minded*, 357.

2. The Massachusetts School for the Feeble-Minded under statutory authority made a contract in behalf of the Commonwealth for the construction of a boys' and girls' home on land of the Commonwealth, and as a compliance with the requirement of R. L. c. 6, § 77, inserted in the contract the following provision: "If at any time there shall be evidence of any lien or claim for which, if established, the owner of said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim." Under this clause the Commonwealth retained a sum equal to twenty per cent of the amount due to the contractor for labor and materials furnished under the contract, and sworn statements of claims against this fund were filed within sixty days after the completion of the work as required by the statute. The trustee in bankruptcy of the contractor brought an action against the Massachusetts School for the Feeble-Minded for the money thus retained, contending that, as the Commonwealth was the "owner" of the premises, no lien or claim had been or could be established against it, to bring the claims within the clause of the contract. *Held*, that the word "owner" was used in the sense of "an ordinary owner" and that the claims referred to were those "for which, if established, an ordinary owner of said premises might become liable," thus giving the provision of the contract effect and enforcing the statute. *Ibid.*

3. The provision of R. L. c. 6, § 77, that "Officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair" applies to a contract made by the Massachusetts School for the Feeble-Minded under statutory authority for the construction of a boys' and girls' home on land of the Commonwealth to be paid for by money furnished by the Commonwealth, the Massachusetts School for the Feeble-Minded being a corporation, through which the Commonwealth carries on charitable work, which in making such a contract acts as an agent contracting in behalf of the Commonwealth within the meaning of the statute. *Ibid.*

Under R. L. c. 201 as amended (St. 1905, c. 370) giving Superior Court jurisdiction of claims against Commonwealth, there is no authority to appoint an auditor, see PRACTICE, CIVIL, 1.

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CONFLICT OF LAWS.

Determination by court of incorporating State as to validity, under constitution and statutes of such State, of assessment on shareholders of foreign corporation binds this court in action by receiver, there appointed, to collect assessment from Massachusetts shareholders, see JUDGMENT, 1–3.

CONSPIRACY.

In actions of deceit against three persons who separately made like misrepresentations, allegations of conspiracy, if made, are not gist of action and plaintiff can recover from any defendant whose representations were actionable apart from question of joint plan to defraud, see DECEIT, 1, 2.

For evidence warranting finding that representations had been made in pursuance of a conspiracy to defraud plaintiff, see DECEIT, 4.

CONSTITUTIONAL LAW.

Impairment of Contract.

1. A Legislature may enlarge the remedy provided for the enforcement of an existing substantive right, or may provide a new remedy therefor, provided it neither enlarges nor diminishes the right itself. *Converse* v. *Ayer*, 443.

2. Where, in an action by a receiver of a Minnesota corporation appointed by a Minnesota court against a shareholder residing in a State other than Minnesota or Massachusetts to enforce an assessment authorized by the State constitution of Minnesota in accordance with a remedy provided by a statute which enlarged the remedy that existed when the defendant became a shareholder, the defendant contended that the statute under which the receiver proceeded was unconstitutional because, in violation of U. S. Const. art. 1, § 10, it changed to his detriment an obligation arising out of his contract as a shareholder, and, the question being carried to the Supreme Court of the United States, the defendant's contention was held to be unfounded, this court, in an action brought here by the same receiver to enforce against a Massachusetts shareholder the same decree of the Minnesota court, in which the defendant makes the same contention as to the unconstitutionality of the Minnesota statute, is bound by the decision of the Supreme Court of the United States on the constitutional question. *Ibid.*

Due Process of Law.

3. The provisions of R. L. c. 144, §§ 10, 11, that, after the property of an absentee has remained in the hands of a receiver appointed in accordance with the provisions of that chapter until fourteen years after the disappearance of the absentee, and within that time the absentee has not appeared and claimed the property, all the right, title and interest of such

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absentee in the property shall be barred and no action, suit or petition shall be commenced by him for or on account of the property, and that the court shall order the distribution of the unexpended balance of the property to the persons to whom and in the shares and proportions in which it would have been distributed if the absentee had died intestate on the day fourteen years after the date of his disappearance, are constitutional, this being a statute of limitation which the court cannot say is unreasonable. *Nelson* v. *Blinn*, 279.

Statute which shortens period of limitation for certain class of actions is not unconstitutional although construed to apply to rights of action already accrued if statute does not take effect until thirty days after passage thereby giving one who has right of action opportunity to bring suit, see LIMITATIONS, STATUTE OF, 1; STATUTE, 1.

Under this rule St. 1902, c. 406, is constitutional although made to apply to causes of action existing at its passage, see LIMITATIONS, STATUTE OF, 2.

Provisions of St. 1906, c. 393, §§ 5–9, relating to assessment of betterment taxes upon land in Boston are constitutional and assessment is legal although ownership of land has changed in interval between passage of order for laying out street and making of assessment, see TAX, 7.

"Full faith and credit."

Where court of last resort of incorporating State has passed upon validity of proceedings in court of that State by which assessment was levied upon stockholders of foreign corporation, question will not be reinvestigated in action to recover assessment brought in our courts, there being no allegation that decree levying assessment was procured fraudulently, see JUDGMENT, 1–3.

Conclusiveness of adjudication by United States Supreme Court that statute of another State does not infringe federal constitution, see *ante*, 2.

Police Power.

4. There is no doubt as to the constitutionality of St. 1905, c. 308, with regard to the invalidity of certain assignments of future earnings. *McCallum* v. *Simplex Electrical Co.* 388.

CONTRACT.

What constitutes.

Evidence held sufficient to warrant finding agreement to treat certain machines as within scope of contract for royalties to have been shown by conduct of parties, see *post*, 6.

For evidence which shows implied contract to pay for services of which defendant received benefit knowing they were not intended to be gratuitous, see *post*, 5.

Evidence in suit in equity to compel specific performance of contract to issue insurance policy which was held insufficient to show that negotiations had reached stage of binding contract, see INSURANCE, 7.

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Consideration.

1. An agreement to pay a patentee a royalty for a license to manufacture and sell a particular machine, it being uncertain whether it is covered by the patent or not, is binding and will be enforced, although it turns out that the patent is invalid or that the machine is not covered by it, because the agreement is to pay for exemption from disturbance by the patentee and immunity from any claim under his patent. *Strong* v. *Carver Cotton Gin Co.* 53.

Construction.

Construction of clause of contract made by Massachusetts School for Feeble-Minded inserted in compliance with R. L. c. 6, § 77, see COMMONWEALTH, 2.

For construction of provision in policy of liability insurance that insurer should defend action against insured "at its own cost" and that defense should be "in the name and behalf of the insured," see INSURANCE, 6.

Agreement of continuing partner to discharge liabilities of partnership as they fall due imposes obligation to indemnify retiring partner against liability for damages in action, brought after dissolution, based upon false representations made by firm in course of business, see PARTNERSHIP.

Where contract to pay royalties by plain meaning covers only machines protected by certain patent it cannot be shown by oral evidence that it was intended also to include other devices, see EVIDENCE, 8.

Validity.

2. There is nothing invalid or contrary to public policy in an agreement of a continuing partner of a firm upon a dissolution of the partnership to indemnify his retiring partner against liabilities which include or may include a liability for damages for alleged false representations made by the firm in the sale of certain securities. *Price* v. *Parker*, 1.

Condition made by telegraph company part of contract with sender of message that company should "not be liable for mistakes in the transmission or delivery of message where the claim is not presented in writing within sixty days after the filing of the message," is reasonable and valid, see TELEGRAPH, 1.

For limitation of liability for negligent non-delivery or mistake in transmission of messages, made by telegraph company part of contract with sender of message, which was held reasonable and binding in the absence of wilful misconduct or gross negligence on its part, see TELEGRAPH, 2.

Option.

3. One, who has an option to purchase certain real estate by the payment of a price named before a certain day, does not give notice of his election to purchase the real estate under the option by advertising it to be sold by him at auction at a date three days before the option expires. *Thacher* v. *Weston*, 148.

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4. One who holds an instrument in writing signed by the owner of certain real estate, giving him the option to purchase it by the payment of a price named before a certain day, has no interest in the real estate until he has elected to purchase it and has given notice of such election. *Thacher* v. *Weston*, 143.

Lessee remaining in possession after giving at expiration of lease notice of intention to exercise option given by provision in lease to purchase at price to be fixed by arbitration, held, while seeking in good faith to have sale consummated, to be in possession under contract of sale and not to be liable in action for rent or to be ejected by summary process, see LANDLORD AND TENANT, 8.

Right under such provision may be lost by failure to endeavor in good faith to have sale consummated within reasonable time, see EQUITY JURISDICTION, 2.

Building Contract.

See *post*, 12.

Stipulation against Liability for Negligence.

Validity of provision of contract between telegraph company and sender of message limiting liability for mistakes in transmission or non-delivery where no wilful misconduct or gross negligence is shown, see TELEGRAPH, 2.

Whether anything less than reckless and wanton disregard of known duties constitutes the gross negligence which, on part of telegraph company, renders ineffectual such limitation of liability, *quaere*, see TELEGRAPH, 3.

For evidence which was held insufficient to show such gross negligence, see TELEGRAPH, 4.

R. L. c. 122, § 11, deprives defendant of benefit of defense arising from limitation, as to damages not exceeding $100 which otherwise are recoverable at common law, see TELEGRAPH, 5.

Implied.

In fact.

5. The Trustees of the Putnam Free School, a corporation established under St. 1838, c. 85, to maintain a free school in Newburyport, having an income from a fund bequeathed to it for that purpose, made an agreement of co-operation with the city of Newburyport in connection with the high school of that city, whereby the corporation furnished the school building at a fixed annual rent to be paid by the city and agreed to maintain and heat the building and keep it in repair, and the teachers of the high school appointed respectively by the school committee of the city and the trustees of the corporation were subject to approval by the other board, so that they became the choice of both bodies. The corporation agreed to pay the salaries of those teachers other than the principal which were appointed primarily by its trustees, and to contribute toward the salary of the principal, if he was satisfactory to the trustees, all above a certain sum not exceeding a maximum amount. A principal was re-

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elected by the school committee to serve for an ensuing school year whereupon the trustees of the corporation voted "neither to approve nor disapprove" of his election. The school committee stood by its action and the principal accepted the election and served during the year. He was paid $1,600 by the city, and sued the corporation for $400 in an action of contract, with two counts, the first count alleging an express contract to pay him that sum for his services during the school year, and the second count being upon an account annexed. It appeared that, shortly after the plaintiff's election by the school committee, the trustees of the defendant notified the committee that they declined to "pay any portion of the principal's salary for the ensuing year." There was evidence on which it could be found that the plaintiff first had been elected a number of years before at a salary of $2,000, which he understood had not been changed during the succeeding years, although he knew that $1,600 was the amount paid to him by the city and that the remaining $400, until the last year, had been paid to him regularly by the defendant. It did not appear that the plaintiff had any knowledge of the contents of the agreement of co-operation between the city and the defendant, or that he ever received from the trustees of the defendant any notice of their official action in refusing to pay his salary. He knew of a meeting of the school committee at which the matter was discussed and at which the defendant was represented, but his information of the meeting included the statement that the city solicitor, who was present, gave the advice, that under the vote of the trustees the plaintiff's election as principal must be considered valid. The plaintiff testified that he never had been aware of any dissatisfaction on the part of the trustees as a body and possessed no direct information of their official action. After the school opened it was conducted in the usual way. Pupils belonging exclusively to the defendant's school were in attendance and received the usual instruction, and some of the defendant's trustees, including the secretary, were present in the school from time to time. At the close of the school year the plaintiff, as principal of the school, in the presence of the defendant's secretary, signed and presented the diplomas of the graduating class, which bore also the signatures of the trustees. *Held*, that on the first count the plaintiff could not recover, there being no evidence of an express contract, but that the plaintiff was entitled to go to the jury on his second count on the ground of an implied contract, there being evidence on which it could be found that the defendant accepted the benefit of the plaintiff's services, without which its school could not have been conducted, knowing that they were not intended to be gratuitous, without giving the plaintiff any express notice that he must be content with what the city paid or else resign. *Dickey* v. *Trustees of Putnam Free School*, 468.

6. If a manufacturer has agreed to pay a royalty to a patentee on all machines manufactured and sold by him which are covered by the patent, and subsequently treats a certain machine which he is manufacturing as covered by the patent by making regular returns of his sales of the machines and paying royalties upon them at intervals of six months for four years, also advertising the machines extensively under the patent, and marking them

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patented, this is equivalent to an agreement that while this practice exists between the parties the machines shall be treated as covered by the patent, but it does not bind the manufacturer to continue the arrangement after he finds out that the patent is not valid or that the machines he is manufacturing are not covered by it. *Strong* v. *Carver Cotton Gin Co.* 53.

In law.

7. In an action by a city against a life insurance company for money had and received by the defendant in successive annual payments of premiums, upon an individual life insurance policy of the treasurer of the city, made with checks of the city drawn by the treasurer, the transaction showing that the defendant had actual knowledge that the checks were invalid, if it appears that the wrongful payments were a part of an extensive scheme of embezzlement carried on successfully by the city treasurer for six years, the failure of the auditing officers of the plaintiff to detect the embezzlement, even if they were negligent, is no defense to the action. *Newburyport* v. *Fidelity Ins. Co.* 596.
8. In an action by a city against a life insurance company, to recover the amount of premiums paid annually in six successive years on an individual life insurance policy of the city treasurer by checks of the city wrongfully drawn by the treasurer and payable to the defendant, it is no defense that the defendant is a mutual company and that before the action was brought it in good faith distributed the money received as premiums among its policy holders, and has on hand no money received from the plaintiff. *Ibid.*
9. In an action by a city against a life insurance company to recover the amount of premiums paid annually for six successive years on an individual life insurance policy of the city treasurer by checks of the city wrongfully drawn by the treasurer and payable to the defendant, the plaintiff on proving such knowingly wrongful receipts of its money shows a duty on the part of the defendant to return the amount of each payment as soon as made and without a demand by the plaintiff, and the plaintiff is entitled to interest from the date of each payment. *Ibid.*

As to question of actual knowledge of invalidity held, as matter of law, to have been shown by receipt of these checks, see BILLS AND NOTES, 6–9.

Award by Arbitrators.

Award by two of three arbitrators is not binding in absence of express agreement to that effect, see ARBITRAMENT AND AWARD.

Of Seaman.

One who has shipped for voyage from port to port and return under articles by which wages are not payable until end of service, if discharged unjustifiably before voyage is completed, may recover damages suffered, see SEAMAN, 1.

For evidence which is held to raise question for jury whether discharge of seaman was justified by misconduct, see SEAMAN, 3.

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Measure of damages for unjustifiable discharge, see SEAMAN, 2.
For questions arising upon alleged contract to hire plaintiff as steamboat captain, see PRACTICE, CIVIL, 11, 25.

Of Telegraph Company.

As to liability of telegraph company for non-delivery of message, see TELEGRAPH.

Statute of Frauds.

For draft of lease which was held not to be sufficient memorandum of contract to give a lease to satisfy statute of frauds, see FRAUDS, STATUTE OF.

Accord and Satisfaction.

Consent by seaman to discharge before termination of voyage conditioned upon receiving a month's wages is not binding if he is offered wages for five days only, see SEAMAN, 4.
In action by seaman for damages resulting from unlawful discharge, evidence held to raise question for jury whether there had been an accord and satisfaction upon plaintiff's being given an order for five days' wages, see SEAMAN, 5.

Performance and Breach.

10. The owner of certain real estate made an agreement in writing to sell it to one who, as part of the agreement, made an advance payment to an agent of the owner, but who, later, but before the time agreed upon for delivery of the deed, for a reason in no way connected with the ability of the owner to convey a good title, declined to carry out the agreement. The owner brought an action of contract against the agent for the advance payment and, the person who made the payment claiming the money, he was summoned in as a defendant. At the trial of the action, it appeared that the owner's title was encumbered at the time when the agreement with the claimant was made, and the claimant contended that this excused him from performance. The presiding judge refused to direct a verdict for the claimant, but instructed the jury that, in order to entitle the plaintiff to recover, he was bound to show that he had tendered a deed or that the conduct of the claimant excused him from doing so. The jury found for the plaintiff. *Held*, that, in the absence of anything in the agreement to that effect, the vendor was not required to have a good title at the time when the agreement was entered into and from then until the time of performance, and that the ruling of the presiding judge was correct and the verdict of the jury warranted. *Smith* v. *Greene*, 16.
11. The owner of real estate agreed in writing to convey it to one who paid to him $100 at the time of the making of the agreement. One clause of the agreement was as follows: "$350 is to be held by the purchaser to secure right of way . . . from H. . . . If said right cannot be secured for said sum the . . . [owner] . . . shall return said $100." The owner conveyed the real estate to another person, who purchased it *bona fide*, and the person to whom he had agreed to convey brought a bill in equity for

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specific performance of the agreement. After a hearing thereon before a judge of the Superior Court, a decree was made by him, finding that the defendant had refused to perform his agreement and that the plaintiff had been damaged thereby, but refusing specific performance and referring the case to a master to assess damages. From this decree the defendant appealed. There was no report of the evidence. The master in his report, which was filed after a hearing before him on the question of damages only and contained no report of evidence, found among other facts that the plaintiff ascertained that the right of way could not be purchased from H. for $350, but could be purchased for $500, "Whereupon," the parties "agreed that whatever the plaintiff should be called upon to pay for the right of way should not be charged against the defendant at more than the $350 reserved by the terms of the agreement"; and he therefore deducted $150 from the gross damage suffered by the plaintiff. The defendant filed exceptions to the master's report. A final decree was entered overruling the exceptions, confirming the report, and awarding the plaintiff damages, and the defendant appealed, and contended that the finding of the master that the right of way could not be purchased for $350 excused him, under the clause quoted above, from performance of his agreement to convey the real estate to the plaintiff. *Held*, that the other finding of the master as to the later agreement rendered it unnecessary to consider the defendant's contention, even if the question properly was raised upon the record. *Rosenberg* v. *Heffernan*, 151.

Conditions precedent.

12. A declaration alleged that the defendant requested the plaintiff to submit an estimate and to make an offer of the amount for which he would erect a building for the defendant according to certain plans and specifications, and promised that, if the plaintiff's offer of a price was accepted, he, the defendant, would give to the plaintiff a bond conditioned upon the performance by the defendant of a contract for the erection of the building; that the plaintiff submitted an estimate and made an offer which the defendant accepted, and that the defendant promised to pay to the plaintiff a certain amount for the erection of the building from time to time as the work progressed, and to give the bond above mentioned; that the plaintiff had always been ready and willing to carry out the contract, but that the defendant refused to execute and deliver the bond. The defendant demurred. *Held*, that the demurrer must be overruled, since, although the principal purpose of the parties to the contract was the erection of the building, the giving of the bond was intended to be concurrent with the making of the contract and a condition precedent to performance by the plaintiff, and therefore there properly was alleged a contract which was broken by the defendant. *Clark* v. *Gulesian*, 492.

Where policy of accident insurance contains provision that insurer shall be given notice of accident within ten days of "event causing injury," notice given within ten days of an accident is condition precedent to recovery on policy, see INSURANCE, 3.

Condition that telegraph company shall not be liable for mistakes in trans-

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mission or delivery of message where claim is not presented in writing within sixty days is reasonable and valid, see TELEGRAPH, 1.

But it may be waived by conduct indicating intention to deal with claim presented later than sixty days after filing of message upon its merits, see TELEGRAPH, 6.

As may the statutory defense given company by R. L. c. 122, § 11, see TELEGRAPH, 6.

Technical breach.

Technical breach of condition of mortgage not ground for foreclosure, see EQUITY JURISDICTION, 3.

Seaman's contract.

Seaman who ships for voyage from port to port and return under articles by which wages are not payable until end of voyage may recover, if unjustifiably discharged before voyage is ended, damages suffered by him in consequence, see SEAMAN, 1.

Whether seaman was guilty of misconduct justifying discharge held question for jury, see SEAMAN, 3.

Contract to sell real estate.

Plaintiff held to have lost right to have specific performance of contract for sale of land at price to be fixed by arbitrators by failure to endeavor to have sale consummated within reasonable time, see EQUITY JURISDICTION, 2.

Holder of instrument giving option to purchase real estate upon certain terms has no interest in real estate until he elects to purchase and gives notice of election, see *ante*, 4.

Notice of election to purchase is not given by holder's advertising that he will sell property at auction on a date three days before option expires, see *ante*, 3.

Where judge hearing suit for specific performance of contract for sale of real estate which provided that there should be no obligation under it if owner, the defendant, could not give a valid title, found that there were incumbrances of record on property but it did not appear that they were valid, decree for plaintiff was not disturbed by this court, see EQUITY PLEADING AND PRACTICE, 3.

Liability insurance.

Questions arising upon contract of liability insurance limiting reimbursement of insured to sums not exceeding $5,000 paid by him on judgments against him, in a case where judgment exceeded $5,000 by the amount of interest accrued pending disposal of exceptions taken to this court by insurance company which defended action in the name and behalf of the insured, see INSURANCE, 6.

Termination.

Right to terminate contract upon finding that basis for it was erroneous, see *ante*, 6.

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Whether under certain circumstances seaman was guilty of misconduct justifying discharge and termination of contract of employment, said to be question for jury, see SEAMAN, 3.

Arrest on Mesne Process in Action of Contract.

Provisions of R. L. c. 168, § 1, with regard to arrest on mesne process in action of contract are not to be extended by construction, see ARREST, 1.

Statute of Limitations.

Where one given money to use in certain investment agrees to return it if there are no profits within six months, nothing is due and statute of limitations does not begin to run until expiration of six months from date of agreement, see LIMITATIONS, STATUTE OF, 4.

CONVERSION.

Action for conversion against trustee in bankruptcy dismissed for lack of jurisdiction, it being held that goods alleged to have been converted had come within jurisdiction of bankruptcy court and that decision of that court upon matter was final, see BANKRUPTCY, 1.

CORPORATION.

Ultra Vires.

1. *It seems* that, before the enactment of St. 1906, c. 372, giving to the Supreme Judicial Court jurisdiction, upon an information in equity in the name of the Attorney General at the relation of the commissioner of corporations, among other things to restrain any domestic corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter, the Attorney General on his own initiative, by quo warranto proceedings or by an information in equity in the nature of quo warranto, might have procured a judgment or decree ousting a domestic corporation from exercising powers or franchises without right, although the unauthorized acts of the corporation did not warrant, and he did not seek, a forfeiture of the charter of the corporation. *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 194.
2. St. 1906, c. 372, giving to the Supreme Judicial Court jurisdiction, upon an information in equity in the name of the Attorney General at the relation of the commissioner of corporations, among other things to restrain any domestic corporation from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by its charter, expressly covers all cases in which such assumption, exercise or transaction is not of so grave a character as, in the opinion of the Attorney General, to call for a forfeiture of the charter of the corporation; and therefore, since adequate relief is given thereby, quo warranto cannot be maintained in such a case. *Ibid.*

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St. 1906, c. 463, Part I, § 8, which provides that railroad commissioners, if in their opinion a railroad or street railway company has violated the law, and continues to do so after notice from them, shall present facts to Attorney General for his action, does not limit his authority to bring such proceedings to restrain unauthorized acts of such corporation as interest of public seems to demand, see ATTORNEY GENERAL.

Act of public service corporation which is not illegal parting with franchise but mere administrative detail, see PUBLIC SERVICE CORPORATION.

Foreign.

Statutory liability of stockholders.

Questions arising in action brought in this Commonwealth by one, appointed by Minnesota court receiver of Minnesota corporation, to recover assessment levied upon Massachusetts stockholder by Minnesota court under constitution and statutes of Minnesota, as to validity of proceedings in Minnesota court of which defendant had no notice and as to conclusiveness of decree ordering the assessment and constitutionality of statutes under which it was made, see JUDGMENT, 1–3; CONSTITUTIONAL LAW, 2.

Shareholder is concluded by service on corporation in proceedings to marshal its property for payment of its debts of which he has no actual notice or knowledge, see JUDGMENT, 1.

Domestic.

What constitutes insolvency of domestic insurance company within the rule of R. L. c. 118, § 1, St. 1907, c. 576, § 1, see INSURANCE, 2.

For condition of affairs of domestic insurance company which renders its further proceeding with business hazardous to policy holders and warrants absolute injunction restraining its further proceeding with business of any sort, including the winding up of its affairs, see INSURANCE, 1.

Misrepresentations in sale of corporate shares, see DECEIT, 3.

Public Service Corporation.

As to rights and duties of public service corporation, see that title.

COVENANT.

Of Warranty.

1. If a grantee of land under a warranty deed, which conveys a right of way in an alleyway as appurtenant to the land, is evicted from the use of such alleyway by a paramount title, the covenant of warranty is broken. *Richstein* v. *Welch*, 224.

2. In an action for a breach of a covenant of warranty in a deed of real estate, consisting of the plaintiff's alleged eviction from the use of an alleyway adjoining the premises in which the plaintiff was granted a right of way by the deed, the record of a judgment against the plaintiff in an action for trespass, brought against the plaintiff by a third person because of the plaintiff's use of the alleyway, is admissible in evidence to prove an eviction when supplemented by evidence showing that the title was put directly in issue and evidence that the defendant was informed that the

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action for trespass had been brought and was requested to defend the action and contest the claim of the third person. *Richstein* v. *Welch*, 224.

But it is error to rule as matter of law that grantor is estopped by mere fact of judgment to deny eviction it being question for jury what issues actually were determined in action of trespass in which judgment was obtained, see RES JUDICATA.

To renew Lease.

3. A covenant to renew a lease of land runs with the land. *Leominster Gas Light Co.* v. *Hillery*, 267.
4. If a deed of land is made subject expressly to a lease for five years, and the lease contains a covenant for its renewal for an additional term of five years but is not recorded, the grantee in the deed is bound by the covenant to renew, which runs with the land, and it is immaterial whether or not he had actual notice of the covenant before taking his deed. *Ibid.*
5. Whether a grantee of land under a deed made subject expressly to a lease for five years, which contains a covenant for its renewal for an additional term of five years, but is not recorded, if he had the lease in his possession for a considerable time before his purchase of the land without reading the covenant for a renewal or supposing that the lease contained such a covenant, has had actual notice of the covenant, here was left undecided, as the grantee was bound by the covenant without actual notice of it. *Ibid.*

Not to underlet.

Covenant by lessee not "to lease, underlet nor permit any other person . . . to occupy or improve" is not broken by letting one room furnished and cared for to a lodger, see LANDLORD AND TENANT, 4.

Running with the Land.

See *ante*, 3.

By Mortgagor to keep Premises insured.

Technical breach held not to be ground for foreclosure, see EQUITY JURISDICTION, 3.

CUSTOM.

Custom, relied on by one struck by street car, of motormen to ring gongs when workmen resurfacing street were near track held not shown to have been established, see NEGLIGENCE, 31.

Custom in steamship circles with regard to hiring men as affecting proof of contract to hire for definite period, see PRACTICE, CIVIL, 11.

CY PRES.

Doctrine does not apply to gift for specific charity alone and not for general charitable purpose, and if specific purpose has become impossible of performance, gift fails, see CHARITY, 3.

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DAMAGES.

For Property taken or injured under Statutory Authority.

1. An order for the laying out and widening of a street, made by a city council under the law authorizing the assessment of betterments, after complying with the provisions of R. L. c. 48 in regard to notice, which takes part of the land of an abutter without allowing any damages to him or to the other persons whose lands are taken, making no declaration on the subject, is an adjudication that none of these persons is entitled to any damages, which is an "estimate of damages," and after such adjudication it is too late for the abutter to elect to surrender the whole of his land under R. L. c. 50, § 4, in order that the city council may take it if they adjudge that the public convenience and necessity require the taking of the whole of such abutting estate, as this section requires the abutter to give notice in writing of his election to surrender his land "before the estimate of damages is made." *Taintor* v. *Cambridge*, 412.

Abolition of grade crossing.

Questions of damages resulting from abolition of grade crossing and discontinuance of public highway where no land of petitioner was taken, and of cross-examination of expert witness with regard thereto, see WITNESS, 2, 3.

In Action of Contract.

Telegraph.

R. L. c. 122, § 11, with regard to liability of telegraph company for damages resulting from negligence in transmission of message does not change rule of common law that, where there is nothing to bring home to company knowledge of any particular damage likely to result from a mistake, only the expense of sending the message can be recovered, see TELEGRAPH, 7.

Evidence held insufficient to show that probability of special damage to plaintiff as result of failure to transmit message was within contemplation of parties when message was received for transmission, see TELEGRAPH, 8.

Seaman.

Seaman who shipped for a voyage from port to port and return and was discharged unjustifiably at outward port can recover as damages for wrongful discharge compensation for loss of time and necessary expense incurred in returning to port of shipment, see SEAMAN, 2.

In Suit in Equity.

In suit for specific performance in which it was found that there had been a breach but that property had been conveyed to *bona fide* purchaser, bill was retained and damages were awarded, see CONTRACT, 11.

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Damages (*continued*).

In Action of Tort.

False imprisonment.

2. Instructions to the jury, before whom was being tried an action for false imprisonment, that they were not to give exemplary damages but only fair and reasonable compensation, were *held* to be correct. *Paine* v. *Kelley*, 22.

Mental suffering caused by personal injury.

3. The mental suffering for which damages can be recovered in an action for personal injuries is limited to that which results to the person injured as the necessary or natural consequence of the physical injury. *Sullivan* v. *Old Colony Street Railway*, 512.

4. In an action by a married woman for personal injuries, resulting in an extremely nervous condition on her part which might cause the premature birth of a child, she cannot recover damages for her mental suffering on account of the death of a child who was conceived by her seven months after her injuries and was born prematurely seven months later. *Ibid.*

By riparian owner.

Riparian owner may maintain action against one obstructing stream without showing damage to his land differing from that to land of all other riparian owners in like position on river, see WATERCOURSE, 2.

Nor need he show actual damage in present use of land, it being sufficient that land will be injuriously affected if obstructor should by lapse of time acquire right to continue obstruction, see WATERCOURSE, 1.

Mental Suffering.

See *ante*, 3, 4.

Exemplary.

In action for false imprisonment jury is not to give exemplary damages but only reasonable compensation, see *ante*, 2.

DECEIT.

1. The declaration in an action of tort against three persons alleged that each of the three defendants separately made false and fraudulent representations of facts to the plaintiff, knowing them to be false, that he, being ignorant of their falsity, relied thereon and consequently was damaged, contained in its last paragraph the allegation that the representations "were made by the defendants upon an understanding between themselves as a conspiracy for the sole purpose of deceiving the plaintiff," and concluded with the statement, "For which the plaintiff brings this action against the defendants as conspirators to recover his money back." *Held*, that the allegations of conspiracy were not the gist of the action, but that the right of the plaintiff to recover rested upon the damage wrongfully inflicted upon him by the tortious acts of the defendants. *Gurney* v. *Tenney*, 457.

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2. In an action of tort for deceit against three persons, there was evidence tending to show that each defendant made false representations of facts to the plaintiff, knowing them to be false and intending that the plaintiff should act upon them, that the plaintiff, not knowing the representations to be false, did so act and consequently was damaged. There was a verdict against all three defendants, one of whom alone excepted to a refusal by the presiding judge to direct a verdict in his favor because of a lack of evidence of a conspiracy among the defendants. *Held*, that, the representations of the excepting defendant being actionable, the plaintiff was entitled to recover against him quite apart from any joint plan to defraud on the part of all the defendants. *Gurney* v. *Tenney*, 457.
3. Representations by one who is a subscriber to the stock of a corporation organized for the purpose of manufacturing and selling a patented invention, that he himself had invested $2,000 in the stock, that the investment was paying him twelve per cent, that the corporation already was on a paying basis and owned real estate, and that its treasurer was a man of wealth, ability and character, if they are false, are known to the person making them to be false, and are made to a woman who did not know them to be false and for the purpose of inducing her to buy stock in the same corporation are actionable if the woman, relying upon them, buys the stock and it proves to be of no value, since they are false representations of facts and not mere seller's or promoter's talk or representations of something to be done in the future. *Ibid.*
4. An action of tort for deceit against three defendants was tried with an action against one of the three of the same nature, brought by the same plaintiff and arising out of the same state of facts, and there was evidence introduced which it was proper for the jury to consider against all three defendants if there was a conspiracy or combination among them to defraud the plaintiff, but which it was improper for them to consider if there was no conspiracy or combination. The presiding judge refused to rule at the request of one of the defendants that there was no evidence of such conspiracy or combination which included him and left the matter to the jury to determine under appropriate instructions. There was a verdict for the plaintiff against all the defendants. The defendant who made the request excepted to the refusal of the presiding judge to grant it. There was evidence tending to show that the plaintiff, a dressmaker, upon going to one of the other defendants on other business, on that defendant's own motion was advised to invest in the stock of a certain corporation, and to see the treasurer of the corporation (another of the defendants but not the one excepting), and that, in giving the advice, the first defendant made various representations of fact with regard to the treasurer and the company and accompanied the plaintiff to him; that, at a later interview, the same defendant suggested that the plaintiff go to the excepting defendant, an oculist, for treatment for her son, stating that such defendant had invested in the stock of the corporation; that the plaintiff went to see the excepting defendant as suggested and he, on finding out from whom she came, while treating her son, strongly urged the plaintiff to invest in the stock of the corporation; that the plaintiff had several interviews, first

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with one defendant and then with another, that all of the defendants were subscribers for the stock of the corporation which was in need of working capital, all were well acquainted with one another, and that all of them made practically the same representations to her, which were false. *Held*, that there was evidence warranting a finding that there was a conspiracy or combination among the defendants to defraud the plaintiff. *Gurney* v. *Tenney*, 457.

5. In an action by a fire insurance company for deceit to recover as damages money paid by it to the defendant on a loss of household furniture and other articles of personal property under a policy which insured the property in a certain house in Revere, giving the insured permission to remove it to a certain building in Randolph and covering the property "in both locations during removal in proportion as the value in each location shall bear to the value in both," providing that after removal the policy should cover the property in the new location only, there was evidence tending to show that an important part of the property was destroyed by fire after having been removed from the house in which it was when the policy was issued and while it was stored temporarily in another building with a view to its subsequent removal to Randolph. The presiding judge, subject to the plaintiff's exception, instructed the jury that the part of the property thus stored temporarily while it was in process of being moved was covered by the policy. This instruction was erroneous, as the policy did not cover the property while in transit. There was evidence tending to show a fraudulent representation made by the defendant to the plaintiff, after the fire and before the settlement, that the property had not been removed from the place where it was when the policy was issued and that most of the property was in that place at the time of the fire, a small portion only having been removed to Randolph. *Held*, that the erroneous instruction was important as bearing upon the materiality of the fraudulent representation, if there was one, and therefore that the exception to the instruction should be sustained. *Palatine Insurance Co.* v. *Kehoe*, 354.

Payment of loss by fire insurance company obtained by false representations of insured does not preclude company from avoiding settlement and recovering money paid by it, see INSURANCE, 4.

Liability of partner to pay judgment in action of deceit for false representations made by partnership in course of business is liability of partnership within agreement of continuing partner to assume all liabilities of the partnership and the agreement, so construed, is valid and binding, see PARTNERSHIP; CONTRACT, 2.

Action based upon arrest on mesne process of non-resident enticed within Commonwealth by false pretense, see ABUSE OF LEGAL PROCESS.

DEED.

Construction.

A woman of advanced age and physically weak, with two daughters, one of whom neglected her and the other of whom lived with her and nursed and cared for her, having previously made a power of attorney irrevocable for

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five years to an agent with whom she and her faithful daughter had had many disagreements about her business, desiring to be relieved from the care and worry involved in the management of her property which consisted principally of rentable real estate, made a quitclaim deed of all her property to her faithful daughter, her heirs and assigns "in trust for myself during the term of my natural life and upon and after my death in trust for the benefit of said grantee and her heirs and assigns forever." *Held*, that although a possible construction of the words of the deed was that the use was executed by the statute of uses and that the grantor obtained a legal estate for life with a remainder in fee to the grantee and her heirs, yet, under the circumstances mentioned above, the more natural and the true construction was that the grant was upon a trust or a use upon a use which remained unexecuted, and that the grantee took the estate in fee in trust for the benefit of the grantor during her life. *Lima* v. *Cook*, 11.

Deed subject to Lease.

Grantee in deed made expressly subject to unrecorded lease for five years containing covenant to renew for five years is bound by covenant irrespective of notice, see COVENANT, 3–5.

Covenant of Warranty.

Eviction of grantee from use of right of way appurtenant to land conveyed as breach of covenant of warranty, see COVENANT, 1.

Judgment in action of trespass against such grantee is, when properly supplemented, admissible evidence of eviction, see COVENANT, 2.

But, although it is shown that defense of action of trespass was tendered grantor, merely showing that there was judgment against grantee does not estop grantor to deny eviction, see RES JUDICATA.

DEVISE AND LEGACY.

What Estate passes.

1. A testator devised and bequeathed to his wife "all the rest and residue of my estate both real and personal that I may have at the time of my decease to use and dispose of as she may think best for her interest and comfort. And at her decease my will is that what may remain (if any) of my estate thus given to my said wife shall be equally divided between" four charitable corporations named. *Held*, that, as to the real estate, the widow took an estate for life with an unlimited power of disposal in fee, if in her judgment such disposition became necessary "for her interest and comfort," and that the charitable corporations took estates in remainder subject to be divested by an exercise of that power, which, on the death of the widow without having exercised the power, became absolute. *American Baptist Publication Society* v. *Lufkin*, 221.
2. A testatrix, when she was sixty-five years of age, wrote a will in her own handwriting, which contained twenty-four clauses, fifteen of which de-

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scribed specific legacies for the most part of keepsakes and articles of adornment, eight described pecuniary legacies, and the first read, "I devise and bequeath to M. my cottage and all it contains at Nahant — to use for the term of five years or longer." M. was not related to the testatrix. The will contained no residuary clause nor any general phrase expressive of a desire to distribute all her property, and real estate which she owned at Wakefield valued at $4,500 and at Stoneham valued at $1,500 was not mentioned. Other parts of the will showed that the testatrix knew how to make an absolute gift. *Held*, that by the clause quoted the testatrix did not intend to give a fee, but an estate for five years and as much longer as the donee might desire, which, translated into absolute terms by invoking the presumption that the most advantageous gift was intended, gave to the donee an estate for life in the cottage and the land about it and the furniture and chattels therein. *Dow* v. *Abbott*, 283.

3. At the hearing on a petition for registration of the title to land, it appeared that the real estate in question formerly had belonged to a testator, a clause in whose will read as follows: "I give and devise also to said S. my homestead estate . . . To have and to hold the same to him during his life or until he shall have married, and whenever he shall marry, and likewise in case he shall either be married or have issue at my decease, said estate shall vest in him in fee simple, and as his absolute property"; that the petitioner was married to S. after the death of the testator, that there were no children of the marriage, that S. had died, and that by his will the land was devised to the petitioner. The respondents were heirs at law of the testator and contended that the will gave to S. a life estate only. *Held*, that the language employed by the testator admitted of but one reasonable construction, namely, that S. should have the land in fee upon his marriage. *Stimpson* v. *Murch*, 381.

4. Where a fund is left by will to trustees to be used and expended for the comfortable support and maintenance of the testator's son during his life, and after his death to pay the residue, "if any thereof shall be left," to certain persons, and the testator's son dies before him, this does not cause the legacy in remainder to lapse, on the ground that the contingency on which it was to take effect never can happen, but on the contrary it becomes operative at once upon the death of the testator, and the estate which passes is not affected by the fact, that had the son lived the trust by its terms could have been so administered as to leave no remainder. *Thompson* v. *Thornton*, 273.

Heirs at Law.

5. An intention on the part of a testator to give to the words "heirs at law" a different meaning from the ordinary one of heirs of the testator at the time of his death is not to be inferred from the fact that, by the other provisions of the will, ample provision was made for those who were the heirs of the testator at the time of his death. *Boston Safe Deposit & Trust Co.* v. *Parker*, 70.

6. A testator in successive items in his will made elaborate provisions for different trust funds and directed the trustee in each instance to pay the

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income to named beneficiaries, who were in some cases children and in some grandchildren, and to their issue, and in each item closed with a clause similar to the following: "But if the said . . . shall die leaving no children nor descendants living at the time of . . . death then to divide and distribute said estate among my heirs at law." *Held*, that the word "then" was not used as an adverb, but as a conjunction, in the sense of "in that case," or "in that event," and that there was no evidence of an intention on the part of the testator that the words "heirs at law" should have any other than their ordinary meaning of those who were heirs of the testator at the time of his death. *Boston Safe Deposit & Trust Co.* v. *Parker*, 70.

Gift to "Relatives."

7. A testator left a fund to trustees for the comfortable support and maintenance of his son during his life, "and at his decease to pay and distribute, after paying their expenses of said trusteeship, the residue of my estate, if any thereof shall be left, in equal shares to my relatives, by right of representation under the statutes of this Commonwealth." *Held*, that the word "relatives" had its ordinary meaning in a will, designating those persons who would take under the statute of distributions, that its meaning was not changed by the words "in equal shares," which in connection with the words "by right of representation" meant equal shares as given by the statute referred to, and that, under the rule relating to persons who are given by will the same estate which they would take in case of intestacy, the persons designated as relatives took the fund as next of kin of the testator by virtue of the statute. *Thompson* v. *Thornton*, 273.

Residuary Legatee.

8. A testator who was advanced in years and had no wife and no children of his own, but two adopted daughters, L. and M., both of whom were married, personally wrote his will upon a printed form. His relations with L. were most cordial, but with M. they were not cordial. The will contained numerous specific bequests of money, a specific devise of a pasture and of his homestead property, and provisions for the creation of a trust fund of $50,000 with detailed directions for the payment of the income and portions of the principal to various persons. L. and her children were given the benefit of $30,000 of the trust fund, and M. and her children of $5,000. Six of the nine clauses of the paragraph relating to the trust fund contained directions that, in certain contingencies, "this portion shall revert to my General Estate." The last paragraph of the will read as follows: "I hereby name and constitute my adopted daughter L. as my residuary legatee — the amount to remain as a trust fund during her lifetime — the income payable to her quarterly." It did not appear that the testator was a lawyer or had had any special instruction as to the technical meaning of the terms he used. *Held*, that it was the intention of the testator that real as well as personal estate should pass to the person named as "residuary legatee." *Dann* v. *Canfield*, 591.

Power of appointment which under circumstances was held not to have been exercised by residuary clause in common form, see *post*, 9.

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Contingent Remainder.

For contingent remainder which became absolute upon termination of life estate without exercise of power of disposal by will or otherwise, see *ante*, 1.

Exercise of Power.

9. Where a testator leaves to his wife all his real estate for life with an unlimited power of disposal in fee, if in her judgment such disposition becomes necessary "for her interest and comfort," the power is broad enough to permit its exercise by her will, if she finds this to be necessary for her welfare and comfort, but an ordinary residuary clause in her will, where neither the language of the will nor any extrinsic facts indicate an intention to exercise the power, is not sufficient for the purpose. *American Baptist Publication Society* v. *Lufkin*, 221.

Effect on Remainder of Death of Life Beneficiary before Testator.

See *ante*, 4.

Gift to Charity.

Will creating trust held to make valid gift to charity, see CHARITY, 1, 2.

Where gift is made by will for specific charity alone and performance of specific purpose has become impossible, the gift fails, see CHARITY, 3.

Duty of Trustee under Will.

Construction of will directing that testator's "homestead with its appurtenances and furniture and necessary provisions be held for the use of "his family" so long as any one should be living and desire to occupy the same," and duties of trustee thereunder, see TRUST.

Collateral Legacy or Succession.

For life estate and remainder held subject to tax upon collateral legacies and successions and duty of executor with regard to payment of such tax, see TAX, 5.

DISBARMENT PROCEEDINGS.

Finding that note given by client to attorney for services previously rendered was not procured "with fraudulent intent" does not preclude finding that charge was excessive and unreasonable and that attorney was guilty of unprofessional conduct in making it, see ATTORNEY AT LAW, 8.

For circumstances held to warrant such finding, see ATTORNEY AT LAW, 1.

And further that attorney had been guilty of unprofessional conduct in making for purpose of preventing investigation unfounded threat that he would expose client's immorality, see ATTORNEY AT LAW, 2.

DIVORCE.

See MARRIAGE AND DIVORCE.

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DOMICIL.

Whether, on complaint under St. 1906, c. 501, for neglecting to provide for support of minor child, domicil of defendant as distinguished from temporary residence in Commonwealth is material, *quaere*, the facts in the case warranting finding that defendant was domiciled within the Commonwealth, see PARENT AND CHILD, 2.

DOWER.

Where lower part of dwelling house was assigned as dower, as to question whether land on which it stood or only an easement therein was assigned, see PARTITION.

EASEMENT.

Public.

Maintenance in highway of lunch wagon for hours at a time is obstruction of public easement which cannot be justified by license to carry on business as hawker or pedler, see WAY, 1.

Or by permit issued by officers of municipality under color of an ordinance for which there was not legislative authority, see WAY, 2.

ELECTION.

Holder of option in writing to purchase real estate must elect to purchase and give notice of election before he can be said to have an interest in the real estate, see CONTRACT, 4.

Holder does not give notice of election to purchase by advertising that he will sell the real estate at auction upon a date three days before the expiration of the option, see CONTRACT, 3.

By plaintiff, between counts, see PRACTICE, CIVIL, 7.

ELECTRIC LIGHT COMPANY.

Questions arising under arrangement of electric light companies to divide certain territory, see PUBLIC SERVICE CORPORATION, 1–3.

ELEVATED RAILWAY.

Duty to keep stairways used as entrances and exits to stations in reasonably safe condition, see NEGLIGENCE, 19, 20.

See also BOSTON ELEVATED RAILWAY.

EMPLOYERS' LIABILITY ACT.

The employers' liability act gives no remedy to a father for expenses for medical attendance incurred by reason of injuries to his minor son for which the employer is liable to the son under the act. *Jordan* v. *New England Structural Co.* 43.

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Who may give notice of accident required by this statute, see NEGLIGENCE, 4, 5.
Cases of alleged employers' liability, see NEGLIGENCE, 4–17.

EQUITABLE CONVERSION.

The law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction over property as between States. *McCurdy* v. *McCurdy*, 248.
For illustration of this rule, see TAX, 4.

EQUITY JURISDICTION.

Adequate Remedy at Law.

1. A bill in equity for the cancellation of a bond given to the treasurer and receiver general of the Commonwealth under St. 1905, c. 428, by the plaintiff, who is engaged in the business of selling steamship tickets for transportation to and from foreign countries and, in conjunction therewith, in the business of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries, which is conditioned upon the plaintiff faithfully holding and transmitting any money or the equivalent thereof delivered to him for transmission, cannot be maintained on allegations of unconstitutionality of the statute and of liability of the plaintiff to be subjected to a multiplicity of vexatious actions upon the bond which would be avoided by a decree in the equity suit declaring the statute unconstitutional, since the question of the constitutionality of the statute may be raised once for all in any action upon the bond, and a decision that the bond is invalid could be pleaded in bar to the prosecution of any and all other actions thereon, and, therefore, the plaintiff has a complete and adequate remedy at law. *Russo* v. *Chapin*, 64.

To compel Specific Performance of Contract.

2. On appeal from a decree dismissing, after a hearing, a bill in equity for specific performance of an agreement to sell and convey land, all the evidence was reported, and it appeared therefrom that the agreement was contained in a lease of the land by the defendant to the plaintiff and provided that, if the plaintiff requested, the defendant would sell and convey the land to him for a price to be "agreed upon and fixed" according to the award of three disinterested persons, one to be chosen by each party and the third by the two so chosen, and that, on the day that the lease expired, the plaintiff notified the defendant of his desire to purchase and of the name of a referee chosen by him, and three referees thereafter were chosen in accordance with the agreement. There was evidence tending to show that the referees unreasonably delayed making an award and that, although the defendant urged them to proceed with the business diligently, the plaintiff did not urge them, but on the contrary sought further delay, that, being informed that it was impossible for the referees to agree and that

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it would be necessary to appoint new ones, the plaintiff took no steps to do so, and declined to attempt to settle the controversy in other ways when the defendant approached him on the subject. There also was evidence tending to show that the plaintiff thought that the referee appointed by him never would agree to an award which the other referees would agree to, and that he was pleased with the prospect, that he had but little property and had refused to give to the defendant security for the payment of rent pending the trial of a suit with regard to the same controversy brought against him by the defendant in the meantime, and that he did not bring this suit until after the defendant had brought such other proceedings against him. The grounds of the judge's finding for the defendant were not reported. *Held*, that it was the duty of the plaintiff to have the price determined and the conveyance made within a reasonable time, and that the presiding judge well might have found that the plaintiff did not perform that duty; or that he might have found that the plaintiff was acting in bad faith in seeking to keep possession of the property without any intention to pay for it by purchase or otherwise; and that, on either finding, the decree would be justified. *Washburn* v. *White*, 540.

Award by two of three arbitrators is not binding in absence of provision in agreement of reference to that effect, see ARBITRAMENT AND AWARD.

Evidence in suit to compel insurance company to issue policy of insurance and to pay for loss of property alleged to have been insured held to show that no binding contract was made, see INSURANCE, 7.

Upon its being found that there had been a breach of contract to convey real estate but that the property had been conveyed to a *bona fide* purchaser, plaintiff's bill for specific performance was retained and the suit was referred to a master for assessment of damages which were awarded, see CONTRACT, 11; EQUITY PLEADING AND PRACTICE, 1, 3.

To reach and apply Equitable Assets.

Upon equitable attachment of property belonging to married woman, who was engaged in business but had not filed married woman's certificate, in suit against husband, it did not avail her that attaching creditor was at all times aware of facts and was not deceived by failure to file certificate, see HUSBAND AND WIFE, 2.

To restrain Foreclosure of Mortgage.

8. At the hearing on a bill in equity by a mortgagor to restrain the foreclosure of a mortgage of real estate, it appeared that the only breach alleged was a failure to insure in accordance with the terms of the mortgage which required the mortgagor to procure insurance upon the property in companies to be approved by the mortgagee, but which contained no clause making the entire amount secured by the mortgage due upon the breach of the condition as to insurance. Insurance which formerly was upon the property had been cancelled by the insurer and the property had remained for one day uninsured, when the mortgagor procured other insurance and submitted it to the mortgagee, who refused to approve of

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any insurance except by the original insurer. The plaintiff offered in his bill to procure insurance in other companies. *Held*, that the defendant in effect refused to accept any insurance and insisted upon a foreclosure, that the technical breach of the mortgage was without harm to the defendant, and that the plaintiff did all he could to cure it and should have the relief sought against the harsh enforcement of the legal obligation in the mortgage. *McCombs* v. *Elmes*, 19.

To cancel Bond.

Refusal to exercise jurisdiction upon ground that plaintiff's remedy at law was fully adequate, see *ante*, 1.

To set aside Fraudulent Conveyance.

Suit by trustee in bankruptcy to recover real estate conveyed in fraud of creditors and thereafter subjected by grantee to mortgage which was not recorded until after adjudication, see BANKRUPTCY, 3.

To restrain ultra vires Act of Corporation.

Jurisdiction given to Supreme Judicial Court by St. 1906, c. 372, covers all cases where the exercise of privileges *ultra vires* by a domestic corporation is not so serious as to call for forfeiture of its charter, see CORPORATION, 2.

Before passage of that act, Attorney General might have brought quo warranto or information in equity in nature of quo warranto to restrain continuance of such unauthorized act, see CORPORATION, 1.

In Divorce Proceedings.

Jurisdiction in equity granted to Superior Court by R. L. c. 152, § 29, in matters connected with divorce proceeding, includes only controversies which are part of, or incidental to, suits for divorce, see MARRIAGE AND DIVORCE, 2.

Superior Court has no jurisdiction to entertain, in divorce proceeding in which husband is seeking divorce, petition by wife in nature of equitable replevin by which she seeks to regain possession of separate property, see MARRIAGE AND DIVORCE, 1.

Nor has it such jurisdiction under R. L. c. 152, § 28, see MARRIAGE AND DIVORCE, 3.

For illustration of these rules, see MARRIAGE AND DIVORCE, 4.

Plaintiff must come into Court with Clean Hands.

Plaintiff denied right to specific performance where finding that he had not been acting in good faith was warranted, see *ante*, 2.

Multiplicity of Suits.

Bill based in part upon allegation that plaintiff was likely to be subjected to multiplicity of suits dismissed on ground that plaintiff's remedy at law was fully adequate, see *ante*, 1.

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Equitable Replevin.

Superior Court has no jurisdiction in divorce proceeding to entertain petition by libellee in nature of equitable replevin to recover separate property, see MARRIAGE AND DIVORCE, 1–3.

Where Superior Court erroneously made decree granting such petition, this court in reversing decree ordered case to be remitted to Superior Court to give petitioner opportunity under R. L. c. 159, § 6, to amend petition into bill in equity, see MARRIAGE AND DIVORCE, 4.

Evidence held to warrant finding that property sought to be recovered was separate property of wife apart from husband, see HUSBAND AND WIFE, 1.

Information in Nature of Quo Warranto.

To restrain *ultra vires* act of corporation, see CORPORATION, 1, 2.

To liquidate insolvent Insurance Company.

Questions of insolvency of domestic insurance company and of necessity for and scope of injunction restraining further proceedings of company in winding up of its affairs arising upon application by insurance commissioner, under R. L. c. 118, § 7, for the appointment of receiver of company's assets, see INSURANCE, 1, 2.

EQUITY PLEADING AND PRACTICE.

Amendment.

Upon reversing for lack of jurisdiction decree by Superior Court granting petition in nature of equitable replevin by libellee filed in divorce proceeding this court remitted case to Superior Court so that petitioner might have opportunity to amend petition into bill in equity under R. L. c. 159, § 6, see MARRIAGE AND DIVORCE, 4.

Receiver.

Winding up of affairs of domestic insurance company by receiver appointed under R. L. c. 118, § 7, see INSURANCE, 1, 2.

Claimant.

See *post*, 2.

Reference to Master for Assessment of Damages.

1. Where a writ for specific performance of an agreement in writing for the conveyance of real estate is referred to a master for an assessment of damages after a hearing by a trial judge who found that the defendant had broken the agreement, the master is not authorized to report any finding of fact or ruling of law as to whether there was a breach of the agreement. *Rosenberg* v. *Heffernan*, 151.

Certain findings of master, to whom case was referred by judge under these circumstances, held, assuming question properly to have been raised by

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the record, not to show excuse for defendant's non-performance, see CONTRACT, 11.

Findings of Master.

Findings of master that insurance company was solvent and that its condition was not such as to render its further proceeding with business so far as to wind up its affairs hazardous to policy holders set aside as clearly wrong in view of particular facts found by him which are held to show insolvency as matter of law within the rule of R. L. c. 118, § 7, see INSURANCE, 1, 2.

Master to whom suit is referred for assessment of damages has no authority to report any finding of fact upon question whether there was a breach of agreement sued upon, see *ante*, 1.

In a case where such master did report certain findings of fact it was held that, assuming question properly to have been raised upon record, taken together they did not show that plaintiff was not entitled to recover, see CONTRACT, 11.

Exceptions to Master's Report.

2. In a suit in equity certain property was attached as a husband's. A petition of the wife, in which she claimed the property as hers, and sought to be admitted as a "party claimant," was "allowed," but there was no amendment to the bill joining her as a defendant. The case was referred to a master, who found that the property attached was the wife's, but that it was acquired by her in a business which she was carrying on without having filed the certificate required by R. L. c. 153, § 10; that, nevertheless, because the plaintiff knew that the wife was doing business on her separate account, he was estopped from taking advantage of the lack of a certificate and from attaching the property as the husband's. The wife and the plaintiff and one of several defendants filed objections and exceptions to the report. A hearing was had before a judge of the Superior Court, and an interlocutory decree entered, reciting that the case came on for a hearing "upon the master's report and exceptions of the plaintiff and defendants thereto," and decreeing that "the exceptions of each of the parties be overruled." The plaintiff and the defendant who had filed exceptions appealed from this decree, but the "claimant" did not. Several months afterwards a final decree was entered, reciting that the case "came on to be heard . . . upon the exceptions of the plaintiff and both defendants to the master's report," and decreeing that "all said exceptions" be overruled and the master's report confirmed, but it contained no recital as to the interlocutory decree. From this decree the plaintiff, the excepting defendant and the "claimant" appealed. It did not appear that the final decree was erroneously affected by the interlocutory decree. The plaintiff did not object that the "claimant" had not appealed from the interlocutory decree and therefore had no rights under her appeal from the final decree. The "claimant" contended that the ruling of the master that she was doing a separate business was erroneous. This court, on the record, with hesitation considered the "claimant's" contention,

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assuming that the parties, from their attitude, treated the "claimant's" exceptions as still open as if the interlocutory decree had not been entered, and on the merits of the question overruled her exceptions. *Parsons* v. *Henry*, 504.

Findings of Judge.

8. From the record before this court on an appeal from a decree for the plaintiff in a suit for specific performance of an agreement in writing for the conveyance of real estate, it appeared that a clause in the agreement was, "If the . . . [defendant] . . . shall be unable to give title as above stipulated, any payments made under this agreement shall be refunded, and all obligations by either party hereto shall cease." The judge presiding at the hearing of the suit made a decree which denied specific performance on the ground that the defendant had conveyed to a *bona fide* purchaser, but found that the defendant had refused to perform the agreement and referred the case to a master for assessment of damages. He also found that, at the time when conveyance to the plaintiff was called for, there were incumbrances of record upon the property. No evidence was reported. The defendant contended that, under the clause quoted, he was excused from conveyance. *Held*, that the evidence not being reported and it not appearing that the incumbrances were valid, the finding for the plaintiff would not be revised. *Rosenberg* v. *Heffernan*, 151.

After judge presiding at hearing of suit for specific performance of contract to sell real estate has found that defendant has broken agreement but, specific performance being impossible, has referred case to a master for assessment of damages, master has no authority to report any finding of fact or ruling of law as to whether there was breach of agreement, see *ante*, 1.

Decree based upon findings of fact made by judge upon oral testimony will not be reversed upon appeal unless plainly wrong, see *post*, 4.

Alternative Relief.

It being found by the trial judge that there had been breach relied upon in bill for specific performance of contract to convey real estate, but that the property had been conveyed to a *bona fide* purchaser, the bill was retained and the case was referred to a master for the assessment of damages, see CONTRACT, 11; *ante*, 1, 8.

Decree.

Decree based on findings of fact from oral testimony will not be reversed upon appeal unless plainly wrong, see *post*, 4.

Appeal.

4. On an appeal from a decree in equity where all the evidence is reported and it appears that the decree is based upon findings of fact made by the judge presiding at a hearing where there was oral testimony, the findings will not be reversed unless plainly wrong. *Quill* v. *Boston Ins. Co.* 216.

Where one, whose petition to be admitted as "claimant" of property attached

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in suit in equity was allowed, although he never was joined as a party by amendment of pleadings, filed objections and exceptions to master's report but did not appeal from interlocutory decree overruling exceptions of all parties but did appeal from final decree confirming master's report, "claimant's" exceptions to the report were in absence of objection considered on their merits as though open upon the record but with hesitation, see *ante*, 2.

ESTOPPEL.

One who stands by without disclosing ownership and allows his property to be sold to an innocent purchaser for value, thereafter is estopped from claiming it, see SALE.

In action of replevin for certain machines, evidence that previous owner told lessee that if certain person should say machines were worthless lessee might sell them as junk and that person designated did say they were worthless and that defendant purchased them as junk in good faith from lessee will warrant finding for defendant, see REPLEVIN, 3.

Estoppel of landlord, to claim payment on account of alterations by tenant which, otherwise, would have been waste, see LANDLORD AND TENANT, 5.

Where married woman carrying on business does not file certificate required by R. L. c. 153, § 10, fact that one seeking to attach her property on suit against husband is fully aware of facts and was not deceived by failure to file certificate is no bar to attachment, see HUSBAND AND WIFE, 2.

Judgment in action of trespass obtained against grantee of land who offers it in evidence in action against grantor for breach of warranty does not constitute, without more, estoppel of grantor who was tendered the defense of the action of trespass to deny the eviction, see RES JUDICATA.

At second trial of action for assault, fact that plaintiff's evidence at first trial tended to show assault to have been committed on a certain day does not estop him from showing at second trial that assault was committed on a different day, see PRACTICE, CIVIL, 9.

Fact that plaintiff, in certain action, filed in District Court a motion in which he referred to a "judgment this day entered" does not prevent his showing by the record at later stage of case that no such judgment was ever entered, see JUDGMENT, 4.

Plaintiff who puts answers by defendant to his interrogatories into evidence is not estopped to contradict them, see NEGLIGENCE, 23.

EVIDENCE.

Admissions and Confessions.

By conduct.

1. In an action on an agreement to pay royalties to a patentee upon the manufacture and sale of certain machines under his patent, if it appears that the question whether a certain machine manufactured and sold by the defendant was covered by the patent was doubtful and was being

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litigated, an agreement of the parties either express or shown by their conduct, that the machine was covered by the patent, is competent evidence of that fact. *Strong* v. *Carver Cotton Gin Co.* 53.

2. In an action of contract for a balance alleged to be due for remodelling a barn into a dwelling house, where two sets of specifications have been put in evidence, one by the plaintiff and the other by the defendant, each contending that his set and not the other was the foundation of the contract between the parties, the plaintiff may show that the defendant took the set of specifications put in evidence by the plaintiff to a co-operative bank for the purpose of procuring a mortgage, this being evidence of an admission by conduct on the part of the defendant. *Benson* v. *Hall*, 517.

Statement of agent.

Evidence held to show that certain admissions made by agent were made within scope of his authority, and were competent, see AGENCY, 3.

Statement of superintendent as to his responsibility for accident, excluded as not made within scope of his authority, see *post*, 9.

As affecting others in interest.

Where separate actions of tort against two defendants are tried together and defendant in one action testifies in his own behalf, all his testimony can be used against other defendant except his admissions which can only be used against himself, see *post*, 12.

Admission by one alleged to have procured execution of will by undue influence that he did exercise such influence is not evidence of the fact against other parties in interest, see WILL, 2.

Extrinsic affecting Writings.

To vary terms of contract.

3. In an action to recover royalties under a contract in writing granting the defendant a license to manufacture and sell "automatic feed attachments" under a certain patent, which by the plain meaning of its words covers only the manufacture and sale of attachments for which the patent was granted, it cannot be shown by oral evidence that the contract was intended to include automatic feed attachments which were not within the terms of the patent and were not protected by it. *Strong* v. *Carver Cotton Gin Co.* 53.

4. At the trial of an action for breach of an alleged oral agreement by the defendant, made in consideration of the release of him by the plaintiff from liability for injuries received by the plaintiff while in his employ, that he would pay the expenses of medical attendance upon the plaintiff and after his recovery again employ him as before, it appeared that an agent of an insurance company with whom the defendant was insured against loss by reason of injuries to persons in his employ, after interviewing the defendant, called upon the plaintiff, had a conversation with him, gave him a draft for $50 and received from him a release of the defendant in writing in duplicate, stated to be "for the sole consideration of $50 and

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doctor's bill not exceeding $25," in which there was no mention of other expenses for medical attendance or of any agreement for future employment. One copy of the release was retained by the insurance company, and the other was delivered to the defendant. The plaintiff sought to establish the oral agreement relied on by introducing in evidence, both in his own testimony and in that of the agent, the conversation that occurred between him and the agent of the insurance company before the release was signed. The plaintiff did not rely on or offer to prove any fraud in the procuring of the release by the agent. The conversation was excluded. *Held*, that the conversation properly was excluded because it would have tended to vary or contradict the instrument in writing; and, *also*, that it was doubtful whether there was any evidence that would warrant a finding that the agent of the insurance company was an agent of the defendant. *Budro* v. *Burgess*, 74.

Opinion: Experts.

Cross-examination of expert witness regarding opinion as to damages caused by abolition of grade crossing and as to basis thereof, see WITNESS, 2, 3.

Upon issue whether testator had testamentary capacity, non-expert witness who was not attesting witness to will but had sufficiently intimate acquaintance with testator may be asked by executor, expecting negative answer, whether he ever saw testator do anything or heard him say anything which indicated anything unusual respecting his mental condition, see WILL, 1.

Testimony of Deceased Witness.

5. Evidence of what a witness, since deceased, testified at a former trial is competent in any subsequent trial of the same issues between the same parties. *McGivern* v. *Steele*, 164.

6. At the trial of an action of contract, a material fact for the plaintiff to prove was that a demand had been made on the defendant, to prove which the plaintiff, having shown that there had been a former trial of the case at which a witness, W., had testified, and that W. had died, desired to ask the defendant in cross-examination whether W. had not testified that such a demand had been made. The presiding judge ruled, "What statements W. made, I shall exclude." *Held*, that the ruling was wrong, the evidence being competent, and that, in view of the terms of the ruling of the presiding judge, the plaintiff, in order to have this exception sustained, was not required to show that the witness could give W.'s testimony with the necessary accuracy. *Ibid.*

Public Documents.

7. R. L. c. 35, § 5, which states what the words "public records" shall mean in construing the provision of that chapter, does not make the documents therein described public documents. *Allen* v. *Kidd*, 256.

8. At the trial of an action of tort in the nature of trespass *quare clausum fregit* in which one question in controversy was as to the width of a

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certain street in a city, the city engineer of the city in which the street was, called as a witness by the defendant, testified that "it was customary" to keep the note books, in which assistants in his office had made memoranda as to the bounds and courses of streets, as public records. He then was allowed, subject to exception by the plaintiff, to testify as to the contents of such a book, the memoranda in which had been made by one who was living at the time of the trial but who was not called as a witness. In effect, the measurements given from the memoranda were in accordance with those given by surveyors who testified for the plaintiff. *Held*, that, even if the note book were a public document, it was not admissible as evidence of the truth of the facts therein stated; *but* that, the plaintiff not being harmed by the admission of the evidence, the exception should be overruled. *Allen* v. *Kidd*, 256.

Hearsay.

A note book kept by city engineer who is alive at time of trial is not admissible as evidence of the facts therein stated even though it may be public document, see *ante*, 8.

Admissibility of testimony of witness at former trial of same case, now dead, see *ante*, 5, 6.

See also *ante*, 5–8; *post*, 9.

Hearsay in Preliminary Affidavit.

On motion for new trial on ground of newly discovered evidence where affidavit of witness who knows facts cannot be obtained, affidavit of third person setting forth what such witness has said showing his knowledge of facts not known to applicant at time of trial should be received and considered by judge to whom application is made, see PRACTICE, CIVIL, 19.

Res Gestae.

9. In an action by an engineer in a factory against his employer for personal injuries alleged to have been caused by the negligence of a superintendent of the defendant in starting a blower with a revolving shaft in the basement of the factory, after he had sent the plaintiff there on an errand which compelled him to pass under the revolving shaft by stooping, in doing which he was caught by fixed screws on the shaft and was injured, the plaintiff's wife testified that, immediately after the injury to her husband and before he was removed from the factory she had a conversation with the defendant's superintendent, and the plaintiff offered to show that the superintendent then stated to the witness that if he, the superintendent, had not been so lazy the accident never would have occurred. The statement did not tend to contradict any testimony of the superintendent. The judge excluded the evidence. *Held*, that the exclusion was right; that the statement was not a part of the *res gestae*, being a mere narration of a past event, and was not admissible as an admission because it was not within the scope of the authority of the superintendent. *McKenna* v. *Gould Wire Cord Co.* 406.

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Circumstantial.

Evidence of conduct of parties held to show agreement that certain machines should be treated as being covered by certain patent within terms of agreement to pay royalties, see CONTRACT, 6.

In action of replevin, where property was in possession of defendant, who introduced no evidence and evidence introduced by plaintiff would warrant verdict in his favor only if certain inferences were drawn, plaintiff was not entitled to verdict as matter of law, see REPLEVIN, 1, 2.

Of Identity.

A witness, having before him to refresh recollection memorandum made by himself, testified as to treatment given person named therein, and, upon the evidence, it was held that the presiding judge correctly left it to jury to say whether person named on the memorandum was the plaintiff, see WITNESS, 1.

Of Ownership.

In action of replevin it is proper for judge to instruct jury: "The possession of the property by the defendant and exercising rights of ownership over it is evidence of ownership to consider," see REPLEVIN, 1.

See also REPLEVIN, 2.

Of Payment.

Evidence of payment on account of note otherwise barred by statute of limitations, held sufficient to take note out of statute apart from indorsement of such payment made thereupon by person receiving the payment, see BILLS AND NOTES, 4.

Tending to mislead Jury.

10. At the trial of an action of replevin for certain machines, it appeared that the machines were protected by letters patent, that they had been in the possession of one to whom the plaintiff had conveyed them under leases which recited that they were patented, and one of the terms of which was that the lessee should not transfer possession of the machines without the consent of the plaintiff. There had been a fire in the factory of the lessee and the machines had been damaged. The defendant contended and introduced evidence tending to show that there had been negotiations between the plaintiff and the lessee authorizing the lessee to sell the machines as junk, and that under that authority they had been sold to one who sold them to the defendant. The plaintiff introduced evidence tending to contradict that of the defendant, and offered the letters patent, thirty-eight in number, as evidence affecting the probability of his consenting to have the machines sold as junk. Both parties throughout the trial assumed that the machines were patented and referred to the fact in their arguments. The letters patent were long, complicated and elaborate, included drawings and specifications, and were full of technical terms, and the presiding judge

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excluded them on the ground that they might mislead the jury more than they would aid them. *Held*, that, even if the evidence offered was competent, the plaintiff was not harmed by its exclusion, and that the ruling of the judge was warranted for the reason which he gave. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

Collateral Issues.

Evidence held to have been properly excluded as tending to confuse jury, see *ante*, 10.

Question asked in cross-examination held properly to have been excluded by presiding judge within his discretion, as tending to raise collateral issue, see WITNESS, 8.

May be disbelieved although uncontradicted.

11. A jury are not obliged to accept evidence as true because it is uncontradicted. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

Judge presiding at hearing of petition for disbarment need not accept opinion of respondent's experts that fee in question was not, under the circumstances, excessive, see ATTORNEY AT LAW, 1.

In Actions tried together.

12. At the trial of two actions of tort for personal injuries due to the plaintiff's tripping upon a pipe protruding in a highway, which were tried together, one action being against a city and the other against an individual who was constructing the street under contract with the city, the contractor testified in his own behalf and the defendant city requested the presiding judge to rule that none of his testimony could be used against it. The presiding judge refused to rule as requested, but instructed the jury that all of the witness's testimony could be so used except his admissions, which could be used only against himself. *Held*, that the refusal to rule and the instructions given were correct. *Jones* v. *Boston*, 66.

Of Existence and Violation of Company's Rules.

13. In an action against a corporation operating a freight railroad, upon the issue whether the engineer of a slowly moving train of the defendant was negligent in not stopping his train before reaching a junction of the freight track with the tracks of a street railway company when cars transporting passengers were approaching from both directions on those tracks, rules of the defendant for the running of its trains were introduced in evidence by the plaintiff against the defendant's exception. The defendant's superintendent who produced the rules testified that some of them had been modified orally and that they were in force except so far as they were modified orally. He also testified that the employees were "supposed to have these rules furnished to them," and that it was the duty of the train master to see that the employees running a train were "furnished with a copy of these rules." He testified, "These rules that are before me apply to the" defendant. *Held*, that this warranted the jury in

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finding that there were no oral modifications of these rules, or at any rate none that had been put in force. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

14. In an action against a corporation for personal injuries caused by the alleged negligence of the defendant's servants, where rules of the defendant alleged to have been violated have been introduced in evidence by the plaintiff against an exception of the defendant relating to their admission as a whole, if it is open to the defendant on the argument of its exception to object that some of the rules admitted had no bearing on the issues then being tried, this objection cannot prevail, because if such rules were immaterial the defendant could not have been harmed by their admission in evidence. *Ibid.*

Presumptions and Burden of Proof.

15. In an action against a corporation operating a street railway for injuries incurred, while being transported as a passenger in a car of the defendant, from a collision with a freight train at a switch crossing, where there is no direct evidence as to the rate of speed at which the car in which the plaintiff was being transported was moving before it was stopped in the wrong place and caused the accident, and such rate of speed has to be taken into account in considering whether the motorman ought to have seen a freight train approaching on the intersecting track, in the absence of such direct evidence, it can be assumed that the car was moving at the rate of speed usual at such a place. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

Certain instruction held correctly to define "burden of proof," see PRACTICE, CIVIL, 13.

One driving automobile on highway will be presumed to have proper license until contrary is shown affirmatively, see AUTOMOBILE.

In action of replevin it is proper to instruct jury that possession of property by defendant, exercising rights of ownership, is evidence of ownership to be considered, see REPLEVIN, 1.

In action for injuries incurred by falling into vat, evidence that cover had been made for vat which was not used held to have been excluded properly, as, in absence of proof, it could not have been assumed that if cover had been in use it would have been on vat at time of accident, see NEGLIGENCE, 7.

Relevancy and Materiality.

Where one is found, as matter of law, to be chargeable with actual knowledge from face of transaction of invalidity of checks of city received in payment of private debt of city treasurer, evidence upon questions of constructive notice or of the practicability of further inquiry by him who received checks is immaterial, see BILLS AND NOTES, 8, 9.

Evidence that cars of certain street railway were equipped with search lights and that car which struck plaintiff had none lighted is immaterial where it does not appear that plaintiff knew of previous use of search lights and relied upon the absence of search light as indication of safety, see NEGLIGENCE, 29.

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EXECUTION.

A woman who has been arrested on mesne process in action of tort and has given a bail bond conditioned to abide final judgment and "not avoid," after judgment has been obtained and execution has issued is bound to present herself where demand can be made upon her, so that if she fails to pay, judgment creditor may proceed against her by petition for her examination, and if she cannot be found for the purpose of such demand it is breach of bond, see BOND, 1.

Scire facias is a proper remedy for such breach, see BOND, 2.

EXECUTOR AND ADMINISTRATOR.

Where non-resident testator leaves real estate in this Commonwealth subject to mortgage, equity of redemption only is subject to tax upon collateral successions under R. L. c. 15, § 1, see TAX, 3.

Executor of such a testator cannot be compelled to bring proceeds of personal estate from place of domiciliary administration to pay off mortgage in order to leave real estate free from incumbrance and subject to tax on its full value, see TAX, 4.

Duty of executor with regard to payment of tax on collateral legacies and successions upon certain life estate and remainder subject to tax, see TAX, 5.

Right of administrator to give notice of accident in compliance with R. L. c. 106, § 75, does not vest till appointment, see NEGLIGENCE, 5.

Notice signed in his own name by attorney of one who afterwards became administrator held to have been insufficient, see NEGLIGENCE, 4.

EXPRESS COMPANY.

Action against express company for injuries caused by negligence of its employees while pushing truck on platform of railway station, see NEGLIGENCE, 33, 34.

FALSE ARREST.

See ABUSE OF LEGAL PROCESS; ARREST, 2, 3.

FALSE IMPRISONMENT.

If a mortgagee of personal property of a bankrupt, having met by appointment the trustee in bankruptcy of the estate of the mortgagor, goes with him into the shop of the bankrupt, and, after having looked over and checked the property, tries to go out from the shop but finds the door fastened, and is told by the trustee in bankruptcy that the door was locked by his orders, the trustee saying to the plaintiff that he had the door locked because he "didn't know but that the plaintiff would have a gang there," and if, after sharp words with the trustee about the locking

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False Imprisonment (*continued*).

of the door, the mortgagee raps on the door which immediately is unlocked and he passes out, and the trustee then relocks the door, this is no evidence to support an action for false imprisonment by the mortgagee against the trustee in bankruptcy. *Wood* v. *Cummings*, 80.

Action based upon irregular arrest on mesne process of non-resident enticed within Commonwealth by false pretense, see ABUSE OF LEGAL PROCESS.

Damages in action for false imprisonment not to be exemplary but fair and reasonable compensation only, see DAMAGES, 2.

FALSE REPRESENTATIONS.

Judgment in action of deceit brought against partnership after dissolution is obligation of partnership within agreement of continuing partner to assume "debts and liabilities" of partnership, see PARTNERSHIP.

By insured as to particulars of loss as basis of action of deceit by insurance company to recover back money paid in settlement of loss, see INSURANCE, 4.

Action by one enticed into Commonwealth by false representations and there arrested on mesne process, see ABUSE OF LEGAL PROCESS.

What fraudulent concealment of contents of release will avoid it, see RELEASE, 2, 3.

False representations as basis of action for deceit, see DECEIT.

FOREIGN SOVEREIGN.

Upon its being suggested by *amicus curiae* to Superior Court that railroad named as defendant was public property of foreign sovereign the action was dismissed, and this Court approved the proceedings, see PRACTICE, CIVIL, 2; JURISDICTION.

FRAUD.

Conveyance, in fraud of creditors, of real estate, which afterwards was subjected to mortgage, recorded after fraudulent grantor had been adjudged bankrupt, set aside on suit by grantor's trustee in bankruptcy, see BANKRUPTCY, 3.

For certain transactions which, in actions by assignee in insolvency to recover value of goods whose transfer was alleged to be a fraudulent preference, are held as matter of law not to have been in usual course of insolvent's business, see INSOLVENCY, 2, 3.

False pretense used to entice non-resident within Commonwealth where he was arrested on mesne process as basis of action, see ABUSE OF LEGAL PROCESS.

Although there is attempt to defraud, mere concealment of contents of release of cause of action by person to whom it is given will not avoid it, see RELEASE, 2.

To constitute fraudulent concealment which will avoid release it must appear that person to whom release was given understood to state its contents and concealed a material part of them, see RELEASE, 2.

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For facts which do not show such fraudulent concealment, see RELEASE, 8.
Fraudulent representations by insured as to particulars of loss as basis for action of deceit by insurance company to recover back money paid in settlement of claim, see INSURANCE, 4; DECEIT, 5.
Finding by judge hearing petition for disbarment that respondent acted without fraudulent intent in procuring client to give him promissory note in payment for services rendered does not prevent finding that charge made was excessive and therefore that respondent was guilty of unprofessional conduct, see ATTORNEY AT LAW, 3.
For representations of facts affecting value of certain shares of stock which are held to be actionable misrepresentations and not mere seller's talk, see DECEIT, 3.
In action of deceit against three persons who separately made like misrepresentations, allegations of conspiracy are not gist of action and plaintiff can recover from any defendant whose representations were actionable apart from question of a joint plan to defraud, see DECEIT, 1, 2.
For evidence warranting finding that there had been such joint plan to defraud, see DECEIT, 4.

FRAUDS, STATUTE OF.

In an action for the alleged breach of a contract to give the plaintiff a lease in writing of certain premises, the defendant set up the statute of frauds. The plaintiff introduced in evidence as a memorandum of the contract an instrument of lease which, with a duplicate, had been sent by the defendant to the plaintiff for his signature, and was left to be signed before a certain hour or not at all. The instrument had on its back an indorsement that it was a lease from the defendant to the plaintiff and that it had been brought "at about 2.30 P. M. with instructions to sign before 3 P. M. or not good." At three o'clock the agent of the defendant called for the lease, and, on learning that it had not been signed, demanded its return. The plaintiff gave him one of the duplicates, but could not give him the other, which was the one put in evidence, because he had sent it to be examined. The next day the plaintiff signed the duplicate of the lease which he had retained and asked the defendant to sign it. The defendant refused to do so. *Held*, that the paper was prepared and used, not as a memorandum, but as a draft of a lease which never was executed as such by the defendant, and that it never was delivered to the plaintiff either as a lease or as a memorandum, and therefore could not satisfy the statute. *Mentzer* v. *Hudson Savings Bank*, 325.

FRAUDULENT CONVEYANCE.

For conveyance, in fraud of creditors, of real estate afterwards subjected to mortgage which was recorded after fraudulent grantor was adjudged bankrupt which was set aside on suit by grantor's trustee in bankruptcy, see BANKRUPTCY, 3.

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FRAUDULENT PREFERENCE.

See INSOLVENCY.

GIFT.

Delivery.

1. Whether a bank book locked in a trunk in a building used for a shop can be delivered as a gift by a delivery of four keys on a ring, of which one is the key of the shop and another is the key of the trunk, here was not passed upon, because, although such keys were handed to a person, the evidence did not show that they were handed to her as a delivery of the book, they being given to her merely for the purpose of getting out the book and bringing it to the owner. *Day* v. *Richards*, 86.
2. If a man, being very sick, on the day before his death, intending to give a deposit standing in his name in a savings bank to a certain woman, tells the woman's daughter of this intention and says to the daughter, referring to the savings bank book, "Go out in the shop and you will find it in the north corner," and hands her four keys on a ring, one of which unlocks the shop, and the daughter goes to the shop but fails to find the book and so reports to the sick man, and on his repeating the same direction goes again with her brother to the shop and makes another unsuccessful search, and if, upon her telling the sick man that she cannot find the book, he says, "You will, you will," and after his death the book is found in the shop locked in a trunk which is opened by one of the four keys which the sick man handed to the daughter, these facts are not evidence of an actual delivery of the savings bank book to the daughter for the mother such as is necessary to perfect a gift either *inter vivos* or as a *donatio causa mortis*. *Ibid.*

Donatio Causa Mortis.

Attempted gift which failed because of non-delivery, see *ante*, 2.

GAS AND ELECTRIC LIGHT COMMISSIONERS.

Questions arising upon petition that electric light company be ordered to serve one living in locality from which it had withdrawn under arrangement with another company to divide certain territory, see PUBLIC SERVICE CORPORATION, 1–3.

GRADE CROSSING.

Questions of damages caused by abolition of grade crossing and of cross-examination of expert witness in relation thereto, see WITNESS, 2, 3.

Accident at grade crossing, see NEGLIGENCE, 36–37.

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HAWKERS AND PEDLERS.

As a matter of common knowledge, as well as according to the definition in R. L. c. 65, § 13, hawkers and pedlers are persons who travel about, either on foot or in wagons, carrying and exposing goods for sale, and generally, although not necessarily, attracting attention to their wares by outcry, sign or advertisement. *Commonwealth* v. *Morrison*, 199.

License to carry on business of hawker and pedler does not justify maintenance of lunch wagon within limits of highway, see WAY, 1.

By Revised Ordinances of 1883, c. 24, § 3, enacted under authority of St. 1885, c. 323, board of police commissioners was given powers in relation to licensing of hawkers and pedlers, carriages, wagons and other vehicles formerly held by mayor and board of aldermen of Boston and, thereafter, such license given by board of aldermen was of no effect, see BOSTON.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

Separate Property.

1. A wife, with the knowledge and consent of her husband, signed in her own name with a dealer in furniture a lease or contract of conditional sale which purported to convey certain furniture to her, and caused the furniture to be delivered by the dealer to her at the house occupied as a home by her and her husband, where it was used by them jointly. The instalments due under the contract were paid to the dealer, sometimes by her and sometimes by her husband, such payments as she made being in part from funds given to her by her husband, in part from money received from the letting of rooms in the house they jointly occupied, and in part from money which she herself earned. Subsequently the husband procured a divorce from the wife and refused to deliver the property to her. *Held*, that, in a suit in equity brought by the wife to gain possession of the property, a finding that the property was hers, apart from her husband, would be warranted. *Patterson* v. *Patterson*, 112.

Questions as to separate property of spouse arising in suit for divorce, see MARRIAGE AND DIVORCE, 1-4.

Married Woman's Certificate.

2. A married woman, having filed in 1895 a certificate in accordance with Pub. Sts. c. 147, § 11, stating her intention on her own account to enter upon the business of "importing and dealing in Castile soaps, etc.," continued that business until 1901; but, in the meantime, beginning with December, 1895, she began buying and selling wool on her own account, and, as her dealings in wool increased, her transactions in soap became of less and less importance. She filed no new certificate. An equitable

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attachment of certain wool which she had purchased having been made in a suit in equity against her husband, begun in 1901 for the collection of a debt alleged to be due from him to the plaintiff, a master, to whom the suit was referred, found, on evidence not reported, that she was "doing a wool business within the meaning of the statute," and found the other facts stated above; but he also found that the plaintiff had business dealings with her and knew that she was carrying on a wool business and that he was not deceived or misled by her transactions, and that in the course of such dealings he had sold to her some if not all of the wool which he was seeking to subject to attachment; and the master ruled that therefore by estoppel the plaintiff was prevented from taking advantage of the lack of a certificate and from attaching the wool as the husband's. *Held*, that the finding of the master that the married woman was doing a wool business within the contemplation of the statute could not be revised by this court, the evidence not being reported and the other findings of the master being consistent therewith; but that the mere facts that the plaintiff knew that the married woman was doing business on her own account and that he was not deceived by her doing so did not preclude the plaintiff from taking advantage of her failure to file the required certificate and from attaching as her husband's her property used in her business. *Parsons* v. *Henry*, 504.

Husband's Action for Loss of Services.

3. The provision of St. 1902, c. 406, that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced only within two years next after the cause of action accrues, is not restricted to actions for injuries to the person of the plaintiff, and includes an action at common law brought by a husband against a city for the loss of the services and society of his wife and the expenses for medical attendance resulting from injuries to her person caused by the negligence of employees of the water department of the defendant. *Mulvey* v. *Boston*, 178.
4. An action of tort by a husband for consequential damages incurred by reason of personal injuries to his wife does not survive under R. L. c. 171, § 1, not being an action for "damage to the person" within the meaning of that statute. *Hey* v. *Prime*, 474.

ICE AND SNOW.

Under R. L. c. 51, § 19, city is not liable for accident caused by cutting a trench one and one half feet deep in snow and ice covering a street for drainage purposes, see WAY, 12.

Where, because of manner in which defendant street railway had thrown snow from its tracks, driving was difficult in roadway and defendant's tracks were used by travellers driving on highway, one injured by reason of runner of sleigh being caught in a switch causing horse to run away was allowed to go to jury upon issue whether accident happened by reason of defendant's negligence, see NEGLIGENCE, 27.

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INSOLVENCY.

Fraudulent Preference.

1. An assignee in insolvency cannot recover as a fraudulent preference the amount paid by the insolvent on notes indorsed by him, if the payments in question were made by the insolvent with funds furnished to him for the purpose by the makers of the notes. *Jaquith* v. *Davenport*, 397.
2. In an action by an assignee in insolvency to recover the value of goods alleged to have been transferred by the insolvent as a fraudulent preference, it cannot be found that transferring goods of the insolvent into the name of a broker's clerk, falsely stating that they are his, and then selling them as the clerk's when they are not his, is a sale in the usual course of business of the insolvent. *Ibid.*
3. In an action by an assignee in insolvency to recover the value of certain cigars alleged to have been transferred by the insolvent as a fraudulent preference, it appeared that the defendant was and had been for many years a teamster, that a merchandise broker, who was a creditor of the insolvent and knew the defendant, summoned the defendant by telephone to meet him at a certain hotel and, on his doing so, told him, in the presence of the insolvent, that he wanted to sell some cigars that the insolvent was overstocked on, as the insolvent wanted some ready money, that the insolvent "needed some money and wanted some help," that the broker led the defendant to expect that he would make some money on the cigars if he bought them, that thereupon the defendant bought the cigars and paid the broker for them, and that the broker kept the money, which went to him or to his shippers, who also were creditors of the insolvent. *Held*, that this transaction could not be found to be a sale in the usual and ordinary course of business of the insolvent. *Ibid.*
4. In an action by an assignee in insolvency of a firm consisting of two partners to recover the value of goods alleged to have been transferred by the insolvent firm as a fraudulent preference, upon the issue whether the defendant at a certain time had reasonable cause to believe that the firm was insolvent, knowledge of the insolvency of the firm is not shown as matter of law by showing knowledge that at the time in question one of the partners was insolvent or in contemplation of insolvency, if at that time the other partner was in good financial standing. *Ibid.*

Insurance Company.

What constitutes insolvency of domestic insurance company within rule of R. L. c. 118, § 7, (re-enacted St. 1907, c. 576, § 1,) see INSURANCE, 2.

INSOLVENT ESTATE OF DECEASED PERSON.

Appeal to Superior Court from report of commissioners disallowing claim against such estate, see PRACTICE, CIVIL, 20–22.

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INSURANCE.

Life.

Insolvency of company.

1. Under R. L. c. 118, § 7, which provides that if the insurance commissioner, upon examination, is of opinion that any domestic insurance company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or to its policy holders, he shall apply to the Supreme Judicial Court for an injunction restraining it in whole or in part from "further proceeding with its business," if it appears upon an information filed by the insurance commissioner that the defendant is insolvent for the purpose of this proceeding, having outstanding against it disputed claims exceeding its assets, and if the defendant consents to the issuing of an injunction against its writing new policies, a master is not justified in finding that the defendant's condition is not such as to render its further proceedings for the purpose of winding up its affairs hazardous to the policy holders, because the immediate settlement in full of the claims of some of the policy holders would be hazardous to the others, and the payment of losses constitutes an important part of the insurance business; and an absolute injunction should issue. *Cutting* v. *American Ins. Co.* 131.
2. Upon an information by the insurance commissioner under R. L. c. 118, § 7, against a domestic insurance company praying for the appointment of a receiver to take possession of the property of the company and to settle its affairs, where it appears that at the date of the filing of the information the assets of the company exceeded its liabilities by about $40,000 if claims of $300,000 against the company were disregarded, and that these claims were based upon the alleged invalidity of a settlement which the company regarded as final but which was disputed by the policy holders with whom it was made, a master is not justified in finding that the defendant is solvent, a company with outstanding disputed claims exceeding its assets being insolvent as matter of law for the purpose of proceedings under the statute, according to the rule prescribed by R. L. c. 118, § 1, (re-enacted in St. 1907, c. 576, § 1,) requiring the "net assets" of an insurance company to be ascertained after deducting all "claims for losses." *Ibid.*

For recovery by city from insurance company of payments of premiums on individual policy of city treasurer made by checks of city running to cashier of company, it being held that company had on face of transaction actual knowledge of invalidity of checks, and for incidental questions as to notice and interest, see BILLS AND NOTES, 6–9; CONTRACT, 7–9.

In such action, fact that insurance company was conducted on mutual plan and had distributed, in good faith, all money so received among policy holders is no defense, see CONTRACT, 8.

Nor is negligent failure of auditing officers of city to discover the embezzlement which covered a series of years, see CONTRACT, 7.

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Accident.

3. A policy of insurance provided for insurance "against loss . . . caused by bodily injury effected exclusively by external, violent and accidental means, provided written notice of the injury, whether fatal or non-fatal . . . be given by the insured or the beneficiary to the . . . company within ten days of the event causing such injury," and stipulated for the payment of certain named sums in case of "loss of life occurring within ninety days of the event causing the injury," and in case of other losses, specifying that each must occur "within ninety days from the event causing the injury." In an action by the beneficiary under the policy, the declaration alleged that the insured on July 7 met with an accident which was within the terms of the policy but "did not consider" it "of any account," that from August 7 he was confined to his bed until August 11, when he died as a result of the accident, that he had given no notice to the defendant but, within four days after his death, the plaintiff gave notice. The defendant demurred. *Held*, that the requirement that the insurer should be given notice within ten days of the event causing the injury is a condition precedent to the creation of liability under the policy, that the "event causing the injury" was the accident, and that, therefore, the requisite notice was not given and the demurrer must be sustained. *Hatch* v. *United States Casualty Co.* 101.

Fire.

4. A payment of a loss by a fire insurance company, which was procured by fraudulent representations of the insured in regard to material matters, in no way precludes the company from avoiding the settlement thus procured by fraud. *Palatine Ins. Co.* v. *Kehoe*, 354.

5. A rider on a policy of fire insurance, in the Massachusetts standard form, on household furniture and other articles of personal property in a certain house in Revere, giving the insured permission to remove the insured property to a certain building in Randolph, provided further, "This policy to attach and cover the same in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only." A portion of the insured property was destroyed by fire after it had been removed from the house in which it was when the policy was issued and while it was stored temporarily in another building with a view to its subsequent removal to Randolph. *Held*, that the property thus destroyed was not covered by the policy, as the rider did not insure it in transit. *Ibid.*

Action for deceit by insurance company to recover money paid in settlement of loss above described where settlement was procured by false representations of insured as to location of the furniture when burned, see DECEIT, 5.

Technical breach of covenant to keep mortgaged premises insured, see EQUITY JURISDICTION, 3.

Liability.

6. By a policy of insurance against liability for accidents, the insurer agreed that the insured was to be reimbursed for sums paid by him not exceeding

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$5,000 on judgments recovered after a trial founded on an accident described in the policy. An action was brought against the insured for injuries from an accident covered by the policy. The insurer defended the action under a provision in the policy that it should do so "at its own cost" and "in the name and on behalf of the insured." The plaintiff in the action obtained a judgment for $5,000, and, against the remonstrance of the insured, the insurer alleged exceptions which were overruled by this court, the necessary delay causing an increase in the interest on the amount of the verdict. Final judgment was entered for $5,420, made up of $5,000 for the amount of the verdict, $90 for taxable costs and $330 for interest on the amount of the verdict. The insurer paid $5,090, including the amount of the verdict and the taxable costs, but refused to pay the $330 for interest included in the judgment. Execution for this last named amount issued against the insured, who paid it, and sued the insurer for reimbursement under his policy. *Held*, that the plaintiff could not recover, the defendant having discharged fully its obligations under the policy; that the provision in the policy that the insurer should defend such an action against the insured "at its own cost" was not intended to extend the limit of its liability, and that the provision that the defense should be "in the name and behalf of the insured" did not mean that the insurer should regard the interest of the insured to the prejudice of its own interest if there was a conflict between them, such as occurred on the question of carrying the case to this court on exceptions; that the fact that the defendant had paid the amount of the taxable costs included in the judgment was immaterial and it was not necessary to consider whether the defendant was bound to pay these costs or not; that under the policy the limit of the defendant's obligation was a judgment not exceeding $5,000 and the fact that the amount of the judgment in excess of that sum was made up of interest was immaterial. *Davison* v. *Maryland Casualty Co.* 167.

In a case where it was contended that agent of liability insurance company must be treated in regard to his dealings with plaintiff as an agent of defendant, the person insured, it was held to be doubtful whether there was any evidence which would warrant such a finding, see EVIDENCE, 4.

Marine.

7. At the hearing in a suit in equity against an insurance company to compel it to deliver to the plaintiff a policy of insurance and to pay for the loss of the property alleged to have been insured, it appeared that an insurance agent sought to procure from the defendant insurance upon the property of the plaintiff, but that the defendant in a letter to the agent stated that it could not insure the property until bills showing certain expenditures on and the purchase price of the property were submitted to it, and there was evidence that the letter containing such statement was shown to the plaintiff. The bills requested were never submitted to the defendant. There also was evidence that the agent at one time had been an agent of the defendant, but not as to the kind of insurance that the plain-

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tiff was seeking. The property was lost after the time when, according to the contention of the plaintiff, the insurance was effected. The presiding judge found that the agent was not an agent of the defendant to effect the kind of insurance the plaintiff sought, and, on other evidence, found that the agent thought "that an order for such insurance sent by him to the defendant would be honored and the risk accepted by the defendant," and that the plaintiff thought that the insurance had been effected; and the judge ordered the bill dismissed. *Held*, that the decree should be affirmed, since the evidence warranted the findings and at most disclosed negotiations which had not reached the contractual stage. *Quill* v. *Boston Ins. Co.* 216.

INTERCOLONIAL RAILWAY OF CANADA.

This railway was named as defendant in action begun in Superior Court by trustee process and upon its being suggested by *amicus curiae* that it was the property of the King of the United Kingdom the action was dismissed, the proceedings receiving this court's approval, see PRACTICE, CIVIL, 2; JURISDICTION.

INTEREST.

In action by city against insurance company to recover amount of premiums paid annually for six years on an individual policy of city treasurer by checks of city, plaintiff on proving knowingly wrongful receipts of its money shows duty on part of defendant to return amount of each payment as soon as made and without demand, and is entitled to interest from the date of each payment, see CONTRACT, 9.

JOINT TENANTS AND TENANTS IN COMMON.

Where assignment as dower of lower part of dwelling house was made and a question arose as to the land upon which it stood, it was held that whether the land itself or only an easement in the land was assigned, the estate was owned in severalty and not in common and a petition for partition must be dismissed, see PARTITION.

JOINT TORTFEASOR.

In action of deceit against three persons who separately made like misrepresentations, allegation of conspiracy, if made, is not gist of action and plaintiff can recover against any defendant whose representations are actionable aside from any question of joint plan to defraud, see DECEIT, 1, 2.

For evidence held to warrant finding that representations had been made in pursuance of joint plan to defraud, see DECEIT, 4.

One to whom injury resulted from the combined carelessness of the employees of two companies in simultaneous performance of unconnected duties can sue the two corporations jointly, see NEGLIGENCE, 46.

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JUDGMENT.

Binding Effect of Foreign Judgment.

1. A court of Minnesota which had jurisdiction of a corporation incorporated under the laws of that State, in a proceeding instituted under local statutory provisions by a creditor of the corporation, appointed a receiver thereof and later, in the same proceeding, in compliance with further local statutes and constitutional provisions, after a hearing levied an assessment upon the shareholders of the corporation for the purpose of paying the debts of the corporation and the expenses of the receivership and of the collection of the assessment, and authorized the receiver to proceed in any court, local or foreign, to enforce the collection of the assessment. The receiver brought an action in a court of this Commonwealth to enforce the assessment against a Massachusetts shareholder, who had had no notice or knowledge of the proceedings in the Minnesota courts, and the defendant contended that the decree levying the assessment was not valid as to him because he had neither notice nor knowledge thereof. *Held*, that, as the defendant was a shareholder, service upon the corporation in proceedings to marshal its property for the payment of its debts concluded him; *and* that, there being no allegation that the decrees of the Minnesota court were procured fraudulently, such decrees could not be reviewed in the action in this Commonwealth. *Converse* v. *Ayer*, 443.
2. By proceedings, properly instituted in a Minnesota court by a Minnesota creditor against a Minnesota corporation, a receiver of the corporation's assets was appointed and, under the State constitution and enabling statutes, the court levied an assessment upon shareholders to pay the debts of the corporation and the expenses of the receivership and of the collecting of the assessment, which was less in amount than the maximum assessment possible under Minnesota law, and empowered the receiver to bring actions for its collection in any State where it was necessary so to do, and, on an appeal by shareholders to the highest court of resort in Minnesota, this decree was held to be valid. In an action against a shareholder in this Commonwealth, to collect the amount of the assessment upon the shares held by him, the defendant contended that the expenses of the receivership and of collecting the assessment from other shareholders should not be included in determining the amount of assessment to be levied on his shares. *Held*, that the adjudication of the Minnesota court was binding upon the courts of this Commonwealth in an action brought here by the receiver to enforce the assessment, at least so long as the assessment did not exceed the par value of the shares held by the defendant. *Ibid.*
3. In an action of contract by a receiver of a Minnesota corporation against a Massachusetts shareholder therein to recover an amount levied upon the defendant's shares as an assessment by a decree of a Minnesota court under a section of the State constitution of Minnesota which provided that "each shareholder in any corporation, except those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be

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liable to the amount of stock held or owned by him," it appeared that the court which decreed the assessment had appointed the plaintiff receiver and that it was a State court of general jurisdiction, that it had empowered the receiver to collect the assessment by proceedings in any court of any State or territory of the United States, that, by the statutes of Minnesota as they existed when the defendant became a shareholder, a receiver had no power to collect such an assessment, but subsequently, and before the decree above mentioned, a statute had been passed specifically authorizing a decree giving a receiver such power. The court of last resort in Minnesota, which had exclusive jurisdiction of the subject matter and of the corporation, on an appeal by certain shareholders other than the defendant from the decree levying the assessment and empowering the receiver to collect it, decided that the corporation was not a corporation organized for the purpose of carrying on any kind of manufacturing or mechanical business, and that the decree levying the assessment was valid. *Held*, that the questions, whether the corporation was or was not one whose shareholders by the terms of the constitutional provision were subject to the assessment, and whether the enlargement of the remedy against the shareholders by the statute enacted after they became such was within the power of the Legislature, being questions already finally determined by a Minnesota court having exclusive jurisdiction of the subject matter and of the corporation, could not be reinvestigated in the courts of this Commonwealth. *Converse* v. *Ayer*, 443.

Determination of United States Supreme Court that statute of another State does not infringe federal constitution, binds this court when same question is raised, see CONSTITUTIONAL LAW, 2.

Domestic.

4. At the trial in the Superior Court of an appeal from a judgment of a district court, a defendant moved to dismiss the action on the ground that it had been disposed of by a judgment in the district court at a previous stage of the case upon the sustaining by that court of a plea in abatement on the ground of the non-joinder of a second defendant, who afterwards had been made a party. It appeared from the record of the district court that, on the day on which the plea in abatement had been sustained in that court, the plaintiff had filed a motion "that the judgment this day entered be vacated" and that the second defendant be summoned in as a party, and also filed a motion that the case be continued for judgment, and that the case was continued accordingly without the entry of any judgment in favor of the original defendant. *Held*, that the motion to dismiss should be denied, there having been no such previous judgment as that referred to in the motion to dismiss, as the mere fact that the plaintiff had filed a motion to vacate a supposed judgment, referring to it as having been entered on a certain day, could not control a record which showed that no such judgment was entered. *Jagoe* v. *Robinson*, 416.

Judgment in action of deceit against a partnership brought after dissolution

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for false representations made by firm in course of its business is included in contract by continuing partner to discharge all "debts and liabilities of the copartnership as they shall fall due," see PARTNERSHIP.

Judgment in action of trespass against grantee of land as evidence of eviction relied upon as breach of covenant of warranty, see COVENANT, 1, 2; RES JUDICATA.

JURISDICTION.

On an appeal by the plaintiff from an order of the Superior Court dismissing an action of tort against a defendant, named in the writ as the Intercolonial Railway of Canada, for personal injuries alleged to have been received by the plaintiff upon that railway in Canada, it appeared that the railway was not a corporation, that no private individual or corporation had any interest in it, that it was owned and operated by the King of the United Kingdom of Great Britain and Ireland through his government of Canada for the public purposes of Canada, that all the income and revenue arising from its operation were by law appropriated to a fund upon which all the expenses of the government of Canada are chargeable, and that the cost of maintenance and operation of the railway were provided for by appropriation of the parliament of Canada. *Held*, that the action rightly was dismissed, since the courts of this Commonwealth have no jurisdiction to proceed against the public property of a sovereign of a foreign State. *Mason* v. *Intercolonial Railway*, 349.

Want of jurisdiction on ground that railway named as defendant was public property of sovereign of foreign State suggested to Superior Court by *amicus curiae*, a mode of proceeding approved by this court, see PRACTICE, CIVIL, 2.

Motion to dismiss action against executor on ground that suit did not survive may be made at any stage of case as it goes to the jurisdiction, see PRACTICE, CIVIL, 8.

Alien domiciled in Commonwealth may be convicted under St. 1906, c. 501, for neglecting to support minor child whether child is or has ever been resident in Commonwealth, see PARENT AND CHILD, 1.

Whether, on complaint under this statute, domicil of defendant as distinguished from temporary residence is material, *quaere*, see PARENT AND CHILD, 2.

Action of conversion brought against trustee in bankruptcy dismissed for lack of jurisdiction, it being held that property alleged to have been converted had been brought within jurisdiction of court of bankruptcy, see BANKRUPTCY, 1.

Equity jurisdiction given Superior Court in divorce proceedings by R. L. c. 152, § 29, is limited to matters which are part of, or incident to a suit for divorce, see MARRIAGE AND DIVORCE, 1.

Under that section, it has no power to entertain in divorce proceedings, petition in nature of equitable replevin to regain possession of separate property, see MARRIAGE AND DIVORCE, 2.

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Nor has it such jurisdiction under R. L. c. 152, § 23, see MARRIAGE AND DIVORCE, 3.
Decree granting such petition was reversed by full court for lack of jurisdiction and case was remitted to Superior Court to allow petitioner to amend petition into bill in equity, see MARRIAGE AND DIVORCE, 4.
Shareholder is concluded by service on corporation in proceedings to marshal its assets for payment of debts of which he has no actual notice or knowledge, see JUDGMENT, 1.
Where decree of Minnesota court appointing receiver of a Minnesota corporation and levying assessment upon its stockholders was sought to be attacked in action in this Commonwealth by receiver to collect assessment from Massachusetts stockholder, it was held that questions as to the liability of shareholders and the validity of the assessment under the laws and constitution of Minnesota were for the exclusive determination of the Minnesota court and would not be reinvestigated in this Commonwealth, see JUDGMENT, 1–3.

LACHES.

One having right to purchase land at price to be fixed by arbitrators held to have lost right to specific performance by failure to endeavor to have price fixed and sale consummated within a reasonable time, see EQUITY JURISDICTION, 2.
Negligence of auditing officers held to be no defense to one who received stolen funds from embezzler, see CONTRACT, 7.
Negligence of holder of check, see BILLS AND NOTES, 5.

LANDLORD AND TENANT.

Tenancy at Will.

1. Where a tenancy at will has been terminated by the landlord giving a lease in writing to a third person to take effect upon a day of which the tenant was given reasonable notice, the provisions of R. L. c. 129, § 12, in regard to the termination of a tenancy at will by a notice to quit are immaterial, the landlord having resorted to a different method of termination. *Mentzer* v. *Hudson Savings Bank*, 325.
2. Where a tenant at will, paying monthly rent on the first day of each month, has received from his landlord a notice in writing to quit on the first day of the second month after the date of the notice, which under R. L. c. 129, § 12, is sufficient to terminate the tenancy, *it is doubtful* whether subsequent negotiations between the parties for the making of a lease in writing for a term to begin on the day of the termination of the tenancy at will, which before that day are broken off without the making of a lease, no occupancy after that day except under the lease being discussed, can constitute a waiver by the landlord of his rights under the notice to quit. *Ibid.*

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"Lease for more than Seven Years."

8. A lease of land for five years, containing a covenant for the renewal of the lease for an additional term of five years, is a lease for more than seven years within the meaning of R. L. c. 127, § 4, providing for the recording of such a lease, and, if recorded under that section, gives the lessee, upon his election to take a renewal of the lease according to its terms, the rights of a lessee for ten years. *Leominster Gas Light Co.* v. *Hillery*, 267.

Although such lease is not recorded, grantee of land in deed made expressly subject to it is bound by covenant to renew, irrespective of notice, as covenant runs with the land, see COVENANT, 3, 4.

Covenant not to sublet.

4. A covenant by the lessee, in a lease of a part of a building owned by the lessor, not to "lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein but with the approbation of the lessor thereto in writing," is not broken by the lessee if he allows a lodger to occupy one of the rooms included in the lease under a contract by which the lodger pays a certain price per week for the room and its furnishings and care provided by the lessee. *Peaks* v. *Cobb*, 554.

Statute of Frauds.

Draft of lease executed only by alleged tenant to whom it was delivered with indorsement on it that it must be "signed by 3 P. M. or not good" and from whom its return was demanded upon its not having been signed at that hour is not a lease or contract to give a lease within the statute of frauds, see FRAUDS, STATUTE OF.

Covenant to put Premises in Condition at Time of Letting.

5. If the owner of a building near a shoe factory orally lets it to a corporation operating the factory to be used in connection with the factory, and refuses to bear any expense of making the necessary changes to adapt it to that use, but gives the tenant to understand that he has no objection to any changes it desires to make at its own expense, whereupon the tenant makes not very extensive alterations of which the owner knows and to which he does not object until after the lapse of four years, the owner cannot maintain a claim to be paid by the corporation, or the receivers of its property, at the end of the four years for putting his building in the same condition that it was at the time of the letting. *Pfister & Vogel Co.* v. *Fitzpatrick Shoe Co.* 277.

Covenant running with the Land.

Covenant to renew lease runs with land, see COVENANT, 3.

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Covenant to renew Lease.

Grantee in deed made subject expressly to unrecorded lease for five years containing covenant to renew for five years is bound by covenant inspective of notice, see COVENANT, 3–5.

Deposit to secure Payment of Rent.

6. By the terms of a lease in writing of a building, the lessee was to pay the rent and an amount "on account of taxes" in advance on the first day of each month, and he deposited with the lessor a sum of money, which was less than the amount of the payment due each month, to secure the monthly payments. Nothing having been paid on the first day of a certain month, the lessor ousted the lessee on the fourth day of the month. The lessee thereupon brought an action of contract against the lessor to recover the amount deposited with him. The lessor contended that the whole of the monthly payment became due on the first of the month, and that consequently he had a right to apply the deposit toward its payment. *Held*, that the rent could not be apportioned, and, the consideration of a month's rent and a monthly instalment of the taxes being a month's use of the premises, that that consideration failed upon the lessor's interruption of the use; and that therefore there was nothing due to the lessor which would warrant him in refusing to return the deposit. *Hall* v. *Middleby*, 485.

If, before such return, lessee becomes bankrupt, trustee can recover deposit, see BANKRUPTCY, 4.

Ouster of Lessee.

7. The lessee under a lease in writing of a building carried on a retail confectionery business upon the premises and conveyed his stock in trade and fixtures to the lessor in mortgage to secure the payment of the rent. The terms of the mortgage were that, upon default, the lessor, after ten days' notice in writing and three weeks' publication, might sell the property mortgaged at public auction, that, until default, the lessee might remain in possession, but that, upon default, the lessor might take immediate possession of the mortgaged property. The lessee sublet portions of the premises. Rent was due under the lease on the first of the month. Before the expiration of the lease, the rent not having been paid on the first day of a certain month, the lessor three days thereafter entered under the mortgage, took possession of the personal property and of the business of the lessee, sold the property at private sale in the regular course of the retail business, collected rent from the lessee's subtenants, and continued thus in possession for over a month, when he gave to the lessee a notice in writing that he had terminated the lease and taken possession of the premises. *Held*, that the acts of the lessor constituted a complete ouster of the lessee. *Hall* v. *Middleby*, 485.

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Holding over under Option of Purchase.

8. Where a lease of land, which contemplated the making of extensive improvements and the erection of buildings upon the premises for use in business, contained a provision whereby the lessee agreed to pay rent during the term of the lease and "for such further time as the lessee may hold the same" and the lessor agreed that, if the lessee requested it, he would sell and convey the premises to the lessee at a price to be "agreed upon and fixed" by the award of three disinterested persons, one to be chosen by the lessor, one by the lessee, and the third by the two so chosen, and, on the day of the expiration of the lease, the lessee in writing notified the lessor of his determination to purchase, appointed a referee in accordance with the terms of the agreement and remained in possession of the premises, it was *held*, that thereafter, while in good faith the lessee was seeking to have the price determined and the sale consummated within a reasonable time, he was in possession under the contract of sale and not as tenant under the lease, and, although he paid nothing as rent to the lessor pending the consummation of the sale, he was not liable in an action of contract for rent, nor subject to be ejected in a summary process for possession of the land brought under R. L. c. 181. *Washburn* v. *White*, 540.

Termination of Lease.

Where rent is due in advance on the first day of the month and landlord takes possession on the fourth under circumstances which amount to ouster and termination of lease, nothing is due to landlord for that month and lessee or his trustee in bankruptcy subsequently appointed may enforce repayment of deposit made to secure payment of rent, see *ante*, 6, 7; BANKRUPTCY, 4.

LEGACY.

See DEVISE AND LEGACY.

LEWDNESS.

A person who commits any unnatural and lascivious act with another person can be convicted under R. L. c. 212, § 27. Copulation is the natural act of coition and is not within the statute, the word being used inaccurately in the opinion in Commonwealth *v.* Dill, 160 Mass. 536, 537. *Commonwealth* v. *Delano*, 166.

LIBEL AND SLANDER.

1. A defendant in an action of tort for libel is liable for what is insinuated as well as for what is stated explicitly in the alleged libellous statement. *Merrill* v. *Post Publishing Co.* 185.
2. A declaration in an action of tort for libel which alleged that the defendant published of the plaintiff, "he is now ill with disease" (meaning the

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infectious disorder) and "worn with care," does not set forth a statement of the defendant charging the plaintiff with having an infectious disease. *Merrill* v. *Post Publishing Co.* 185.

3. A declaration in an action of tort for libel alleged that the defendant falsely published in a newspaper a certain article "of and concerning the plaintiff in conjunction with his sister also mentioned in said libellous publication." The article in a variety of ways stated that the sister had been arrested for stealing letters from the post-office. The defendant demurred. *Held*, that the alleged statements might be a libel on both the plaintiff and his sister and well might be found to impair the standing of the plaintiff in the community although they did not affect his character, that therefore they were libellous as to him, and that the demurrer should be overruled. *Ibid.*

4. Allegations, contained in the declaration in an action of tort for libel, that the defendant falsely published in a newspaper that the plaintiff's sister and father had for ten years occupied one half of a house, the other half of which was occupied by the plaintiff's cousin, and that the two families had used the same halls, entrances and yard, but had not spoken to each other during that period, the same article stating that the plaintiff lived in another part of the city and that the cousin always spoke to him and "sympathized in his trouble," are not sufficient for the maintenance of the action. *Ibid.*

5. A declaration in an action of tort for libel alleged that the plaintiff was the postmaster of Salem, that the defendant, "contriving and maliciously designing to injure the plaintiff in his office as postmaster, and to disqualify him for and to imply misconduct by him in his office," published in a newspaper of wide circulation an article stating that the plaintiff's sister had been arrested "for stealing letters," that the plaintiff or his wife sold real estate at a sacrifice, that "some do not hesitate to call [the sister] a 'martyr,' a woman who placed herself in a compromising position in order that she might help others (meaning the plaintiff)." The defendant demurred. *Held*, that it could not be said as a matter of law that "others" did not mean the plaintiff or that the count did not allege an insinuation that the plaintiff's difficulties were such that his sister stole in order that she might help him out of them, and that therefore the demurrer must be overruled. *Ibid.*

LICENSE.

Prosecution for carrying on business of pawnbroking without a license, see PAWNBROKER, 1, 2.

License to carry on business of hawker and pedler does not justify maintenance of lunch wagon in highway, see WAY, 1.

Nor does permit issued by officer of municipality under color of ordinance for which there was no legislative authority, see WAY, 2.

Powers of mayor and aldermen of Boston in relation to licensing of hawkers and pedlers, carriages, wagons and other vehicles were given, by Revised Ordinances of 1888, c. 24, to the board of police commissioners and such

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License (*continued*).

license granted thereafter by board of aldermen was of no effect, see BOSTON.

It seems that one injured by reason of defect in highway while driving an automobile thereon without proper license cannot recover under R. L. c. 51, § 18, see AUTOMOBILE.

But proper license will be presumed until contrary is shown affirmatively, see AUTOMOBILE.

LICENSING BOARD.

Return of transactions of pawnbroker to licensing board required by R. L. c. 102, § 42; St. 1907, c. 211, is not public record to which R. L. c. 35, § 17, applies, see PAWNBROKER, 3, 4.

LIMITATIONS, STATUTE OF.

1. Statutes of limitation, where they contain no language clearly limiting their application to causes of action arising in the future, are construed to apply as well to causes of action which already have accrued as to those which may accrue afterwards, if sufficient time has been allowed between the passing of the act and the time fixed for the new limitation to take effect to afford full opportunity for all persons having such causes of action to bring their suits. *Mulvey* v. *Boston*, 178.
2. St. 1902, c. 406, provides that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced only within two years next after the cause of action accrues." Under statutes previously in force such actions were barred only by the lapse of six years, and this statute took effect under the general law thirty days after its passage. *Held*, that, assuming that rights of action against counties, cities and towns for injuries to the person which had accrued at the time of the passage of the act were sufficiently rights of property to be entitled to protection under some of the provisions of the Declaration of Rights, the statute is not made unconstitutional by construing it to apply to such pending actions, because thirty days is not such an unreasonably short time for the bringing of suits in this Commonwealth on existing rights of action that the Legislature cannot prescribe that limit constitutionally. *Ibid.*
3. The provision of St. 1902, c. 406, that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced only within two years next after the cause of action accrues," is not restricted to actions for injuries to the person of the plaintiff, and includes an action at common law brought by a husband against a city for the loss of the services and society of his wife and the expenses for medical attendance resulting from injuries to her person caused by the negligence of employees of the water department of the defendant. *Ibid.*
4. In an action on an instrument in writing by which the defendant acknowledged the receipt of $200 for use and investment in a certain mine, and agreed that if no profits or returns were received from the mine within six months he would return the $200 with interest, it appeared that no

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profits or returns were received within six months or at any other time. The statute of limitations was pleaded. The date of the writ was more than six years after the date of the agreement declared on, but less than six years from the expiration of six months after that date. *Held*, that under the terms of the agreement nothing could have been due until the expiration of six months from its date, and therefore that the action was not barred by the statute. *Davis* v. *Crawford*, 309.

Provisions of R. L. c. 144, §§ 10, 11, that estate of absentee may be distributed after a lapse of fourteen years from date of his disappearance are constitutional, this being a statute of limitation which court cannot say is unreasonable, see CONSTITUTIONAL LAW, 3.

Provision of R. L. c. 122, § 11, may be waived by telegraph company, see TELEGRAPH, 6.

Evidence of payment on account of promissory note which is sufficient to avoid bar of statute of limitations, see BILLS AND NOTES, 4.

LODGER.

Letting furnished room to lodger is not breach of covenant not to sublet, see LANDLORD AND TENANT, 4.

LORD'S DAY.

Check delivered on Sunday by drawer to payee in payment of debt contracted on a secular day and accepted by payee as such is of no effect in hands of payee, see BILLS AND NOTES, 1.

But, if payee receives payment of the check either from the bank on which it is drawn or from an indorsee he cannot again collect debt from drawer, see BILLS AND NOTES, 1.

And in the hands of such indorsee, taking for value and without notice, the check is valid, see BILLS AND NOTES, 2.

LUNCH WAGON.

Maintenance of lunch wagon in highway cannot be justified by license to carry on business of hawker and peddler, see WAY, 1.

Nor by permit issued by officer of municipality under color of ordinance for which there was not legislative authority, see WAY, 2.

MARKETABLE TITLE.

In absence of specific provision, one who agrees to sell real estate is bound to have marketable title only at the time set for conveyance, see CONTRACT, 10.

MARRIAGE AND DIVORCE.

1. The Superior Court has no jurisdiction to entertain, in a divorce proceeding in which a husband is seeking a divorce on the ground of the wife's

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adultery, a petition by the wife seeking to compel the husband to deliver to her personal property which she alleges to be hers, but which he refuses to deliver to her and prevents her from reaching by process of replevin or other process of law. *Patterson* v. *Patterson*, 112.

2. The jurisdiction in equity in matters connected with libels for divorce when the course of proceeding is not specially prescribed, granted to the Superior Court by R. L. c. 152, § 29, includes only such controversies as are a part of, or incidental to, suits for divorce, and does not include a controversy between the libellant and the libellee in a divorce libel, involving the question as to which of them is entitled to certain personal property purchased by the wife in her own name with the knowledge and consent of her husband, used by them in their home and paid for from money of both of them, the dispute being one which has no direct connection with the proceedings for divorce nor with conditions resulting therefrom. *Ibid.*

3. R. L. c. 152, § 23, which, although it gives to the Superior Court power, when a divorce has been granted to a husband on the ground of his wife's adultery, to make a provision from her sole and separate property for the maintenance of children in the custody of the husband and secures to her the remainder of her separate propetry, does not give the court jurisdiction to entertain a petition by the wife to compel the husband to deliver to her property which she alleges is hers but which he refuses to deliver to her. *Ibid.*

4. In divorce proceedings in which a husband sought a divorce on the ground of adultery of his wife, the wife filed a petition seeking to compel the husband to deliver to her certain personal property, alleging that the property was hers, that he refused to deliver it to her and that she could not reach it by a process of replevin or other process of law. There was a joinder of issue and, after the husband had been granted a divorce, there was a reference to a master who found that the property was the wife's and that the husband should deliver it to her, and a decree of the Superior Court was made to that effect. On appeal by the respondent, it was *held*, that the decree should be reversed because the Superior Court in the divorce proceedings had no jurisdiction of the matter, but that the case should be remitted to the Superior Court to give the petitioner an opportunity to amend the petition into a bill in equity under R. L. c. 159, § 6. *Ibid.*

Evidence held to show that certain property acquired after marriage was the separate property of wife, see HUSBAND AND WIFE, 1.

See also HUSBAND AND WIFE.

MARRIED WOMAN.

See MARRIAGE AND DIVORCE; HUSBAND AND WIFE; DAMAGES, 4.

MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED.

Contract made by this institution under statutory authority for construction of building on land of Commonwealth is contract made by agent con-

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tracting on behalf of Commonwealth within R. L. c. 6, § 77, providing for taking in such contract security for payment by contractor or subcontractor for labor and materials, see COMMONWEALTH, 3.

For clause inserted in such contract as compliance with this statute and construction thereof giving person who had furnished labor and materials an equitable interest in fund retained under the clause in question, see COMMONWEALTH, 1, 2.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE.

MORTGAGE.

Of Real Estate.

1. The owner of certain real estate conveyed it in mortgage to secure the payment of a note signed by him, and then, before the note became due, conveyed the equity of redemption to one who was not liable upon the note, with whom, after the note became due, the mortgagee made an agreement not to foreclose the mortgage so long as the interest was paid regularly, by reason of which there was delay in foreclosure and the real estate, which, when the note became due, was of sufficient value to satisfy it upon foreclosure proceedings, depreciated until its value fell short of the amount due on the note. In an action by the mortgagee against the mortgagor upon the mortgage note, it was *held*, that the agreement of the mortgagee with the grantee of the equity of redemption to extend the time of payment of the note was valid and binding upon the plaintiff and operated to release the mortgagor to the amount by which, because of such extension, the value of the security fell short of the amount due on the note. *North End Savings Bank* v. *Snow*, 339.

Covenant to keep property insured.

Where mortgagor covenants to keep property insured in companies satisfactory to mortgagee and, upon cancellation of policy by original insurer, property remains uninsured one day and, upon being tendered insurance in other good companies, mortgagee refuses to accept policy from any but original insurer and seeks to foreclose, breach of condition is technical only and foreclosure will be enjoined, see EQUITY JURISDICTION, 3.

Technical breach.

Foreclosure enjoined where breach was technical and did not injure mortgagee and mortgagor did all he could to cure it, see EQUITY JURISDICTION, 3.

Unrecorded.

Holder of mortgage taken in good faith upon real estate conveyed to mortgagor in fraud of creditors but not recorded until after fraudulent grantor has been adjudged bankrupt cannot retain mortgaged land against fraudulent grantor's trustee in bankruptcy, see BANKRUPTCY, 3.

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Mortgage (*continued*).

Nor does it help him to set up that mortgage creates a trust, as unrecorded trust concerning land is, under R. L. c. 147, §§ 1–3, of no more effect than unrecorded mortgage, see BANKRUPTCY, 2.

Tax on collateral successions.

Where non-resident testator leaves real estate in this Commonwealth subject to mortgage, equity of redemption only is subject to tax upon collateral successions under R. L. c. 15, § 1, see TAX, 3.

Of Personal Property.

2. A mortgagee of personal property, who has the right to the possession of the property on account of a breach of condition, has no right to enter the close of another person for the purpose of taking the property. *Kennedy* v. *Hoyt*, 361.

After acquired property.

3. A mortgage of a greenhouse, including the plants then in it and after acquired property and giving the mortgagor the right to sell flowers and plants in the ordinary course of trade, where the mortgagee never has taken possession of the plants acquired after the delivery of the mortgage, gives him no title to such plants which can pass to a purchaser at a foreclosure sale under the mortgage. *Schlatter* v. *Young*, 86.

MUNICIPAL CORPORATIONS.

Town Meeting.

1. Although in general the action of town meetings conforms to parliamentary procedure, it never has been held that they are governed by the strict rules of legislative practice. *Wood* v. *Milton*, 531.
2. A vote of a town at a town meeting "To indefinitely postpone" action on an article in the warrant calling the meeting is the equivalent of complete disapproval of the action proposed in the article. *Ibid.*
3. Where the question whether a town "will vote to accept" a street "as laid out by the selectmen" is properly before a town meeting which votes "To indefinitely postpone," such vote is a final rejection of the layout and, there having been no further action by the selectmen meanwhile, if a town meeting held a year later, the warrant for which contains an article identical with that of the previous meeting, votes "to accept" the street "as laid out by the selectmen," the action of the second meeting is invalid. *Ibid.*

By-Laws and Ordinances.

Permit to obstruct highway issued under color of ordinance passed without legislative authority is without effect, see WAY, 2.

Officers and Agents.

Where total amount of betterment assessment is less than cost of construction exclusive of certain alleged illegal expenditures by superintend-

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ent of streets, in considering the validity of the assessment expenditures in question are immaterial, see TAX, 8.
One who receives check of city in payment of individual debt of city treasurer has notice on face of transaction that in absence of express authority, check is invalid, see BILLS AND NOTES, 6.
For recovery by city from insurance company of payments of premiums upon individual policy of city treasurer made by checks of city made out to cashier of company which is held to have had actual knowledge of invalidity of checks see BILLS AND NOTES, 6–9; CONTRACT, 7–9.
Negligent failure of auditing officers of city in not discovering embezzlement held to be no defense to such action, see CONTRACT, 7.
In such a case city is entitled to interest upon each payment from date upon which it was made, see CONTRACT, 9.
Maintenance of lunch wagon within limits of highway is obstruction of public easement which cannot be justified by permit issued by officer of municipality under color of ordinance for which there was not express legislative authority, see WAY, 2.
Licensing and regulations of hawkers and pedlers, carriages, wagons and vehicles in Boston, see BOSTON.

Liability for Defect in Highway.

St. 1902, c. 406, providing that actions of tort for injuries to the person against counties, cities and towns shall be commenced within two years includes husband's action at common law for medical expenses which result from injury to wife and for loss of her services and society, see LIMITATIONS, STATUTE OF, 3.
See also WAY, 3–12.

NEGLIGENCE.

Due Care of Plaintiff.

Where the physical conditions attending the running down of one riding, driving or walking on a highway across railroad or street car tracks were such that if he had looked with ordinary care he must have seen a train or car approaching, in time to protect himself, it is not evidence of his due care for him to testify that he looked but failed to see the train or car, see *post*, 28, 30, 35–37.
Of one who chooses to attempt in a dangerous way that which he could do in another manner safely, see *post*, 2.
Of one who goes into dangerous place on bridge in pursuance of duty to keep it clear and while moving obstruction is injured by reason of negligence of defendant, see *post*, 3.
Of boy feeding power press who was injured while attempting to remove something caught therein while machine was running when he could have stopped press and removed it in complete safety, see *post*, 2.
Of one injured while in charge of work carried on without proper permit in violation of city ordinance, see *post*, 3.

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Negligence (*continued*).

Of one set to work without proper warning upon carding machine to which was attached dangerous device with which he was not familiar, see *post*, 6.

Of one working with back toward travelling crane which came at irregular times and which he could not hear on account of other noises, depending upon superintendent to warn him of crane's approach, see *post*, 10.

Of employee of painter who, upon being directed to use thirty foot falls, takes the only ones of that length available and is injured when one breaks as result of concealed defect, see NEGLIGENCE, 14.

Of one driving wagon on highway very slowly who after looking directs horse across tracks of street railway and is struck by car which was moving very rapidly, see *post*, 26.

Of woman who is struck by street car which she must have seen approaching had she looked carefully, see *post*, 28.

Of one driving ice wagon across grade crossing of railroad at a point where there was nothing to obstruct view for eight hundred feet and where he knew train was about due, struck by train running twenty miles an hour, see *post*, 36, 37.

Of nine year old girl who attempted to cross in front of car which she saw rapidly approaching and was struck by it, see *post*, 30.

Of workman engaged in resurfacing street, struck by car coming from direction toward which his back was turned, see *post*, 31.

Of passenger walking on crowded platform of railway station who is run into by truck pushed by employee of express company, see *post*, 32–34.

Of one who in leaving railroad station steps off plank walk provided for exit of passengers in front of approaching train, see *post*, 35.

Of traveller on crowded sidewalk who steps into open coal hole at time when coal wagon was backed up in front of building to which coal hole belonged and teamster was shovelling scattered coal out of gutter, see *post*, 40.

Of boy ten years of age who is run over in street where he has been playing ball in violation of city ordinance, see *post*, 44.

Of one suing town for injury resulting from defect in highway who knew of existence of defect but, being obliged to use road, was trying to avoid it when injured, see *post*, 45.

Imputed.

1. At the trial of an action of tort for injuries caused to the plaintiff, a young woman, because of negligence of the defendant which caused a horse, which was drawing a sleigh in which the plaintiff was, to run away, there was evidence tending to show that the driver of the sleigh was negligent, and a material question was, whether his negligence, if any, would bar the plaintiff from recovering. The defendant requested the presiding judge to rule that, if the jury should find that the plaintiff entrusted the care and management of the horse and sleigh to the driver and relied solely upon him for safety, then, in order to recover, she must show that the driver was, at the time of the accident, exercising due care in the management of the horse and sleigh. The ruling was refused and the

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judge charged the jury that, if the plaintiff had authority or control over the driver, and negligence on his part contributed to her injury, or if, by reason of a condition of things which she observed, she was under a duty to warn him or had reason to suppose a want of care or skill on his part, and did not warn him and such failure to warn contributed to cause the accident, then she could not recover; but that, if she had no authority or control over him, if there was no duty to warn him, and if she had no reason to suppose any want of care or skill on his part, then, if the defendant's negligence caused the injury, she could recover notwithstanding the fact that negligence of the driver contributed to cause it. *Held*, that the ruling requested was refused rightly and that the charge given was correct and sufficient. *Miller* v. *Boston & Northern Street Railway*, 535.

Voluntarily incurring Danger.

2. In an action by a boy against his employer for personal injuries from having his hand crushed between the moving platen and the die of a power press used for cutting out cardboard for boxes, which he was operating, it appeared that the plaintiff had had an experience of nearly four years in the use of such a machine, that it was his duty to feed in the sheets of cardboard, taking out the completed form as the platen moved back from the die and placing a fresh sheet in position, that this was done once every three seconds, that the machine could be stopped whenever the operator wished by shifting a belt and applying a brake, that on the occasion of the accident a piece of cardboard had got into a place in the machine where it ought not to be, when the plaintiff, without attempting to stop the machine either wholly or partially, which he said in his testimony could have been done easily, attempted to remove the piece of cardboard while the machine was running at full speed, saying in his testimony that there was no need of stopping the machine. *Held*, that the plaintiff could not recover, as his injury was the result of his exposing himself unnecessarily to an obvious danger, and that the fact, that he thought there was time to make the experiment safely, or possibly to repeat what he had done before without harm, did not relieve him from the consequences of voluntarily incurring the obvious peril. *Whippen* v. *Stone*, 519.

3. In an action for personal injuries by a foreman in the employ of the water department of a city against the owner of a horse and wagon, whose driver negligently started the horse suddenly, thereby causing the wagon to strike a temporary railing of a temporary bridge and to push it against the plaintiff so as to knock him off the bridge, it appeared that the bridge had been constructed the day before under the direction of the plaintiff at a junction of two public streets, in order to provide a passage for travellers over a trench which had been excavated by men under the charge of the plaintiff, that on each side of the bridge was a succession of light wooden horses about two feet wide at the base and set about two feet in from the edge of the bridge but not attached to it, that these wooden horses were connected by planks nailed on their tops so as to form a continuous line on each side of the bridge, that just before the accident the

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plaintiff was standing upon a bank of earth near the bridge and saw the defendant's horse and wagon and another horse and wagon trying to pass each other on the bridge headed in opposite directions, that there was loud talk between the drivers and the hubs of the wheels were so situated that the wagons could not pass without coming in collision, that the plaintiff, observing this situation, jumped between the edge of the bridge and the line of wooden horses opposite the horse of the defendant, that it was part of his duty as foreman to keep the bridge free from obstruction and clear for the purpose of travel, particularly in view of its possible use by the fire department, and that in pursuance of this duty he went to move the line of wooden horses in order to make room for the wagons to pass, that, while he was taking hold of a wooden horse to move it, the defendant's driver whipped his horse, causing him to start sharply and suddenly and the wagon to strike the wooden horse and throw it against the plaintiff, knocking him into the trench and causing his injuries. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury, who should take into consideration the plaintiff's duty and the exigency under which he acted as well as the obviousness of the danger and the extent of the risk. *McCarthy* v. *Morse*, 332.

Whether one run into by truck while on platform of railroad station near express cars just before leaving time of train voluntarily exposed himself to obvious danger is a matter for the jury to consider in passing on question of his due care, see *post*, 33.

Trespasser.

One who leaves safe way of exit from station provided for passengers and attempts to make exit in some other way becomes trespasser or at most mere licensee, see CARRIER; NEGLIGENCE, 35.

Licensee.

Where railroad corporation has provided safe exit from station for passengers and knowingly, without invitation express or fairly to be implied from situation and arrangement of station, a passenger leaves way marked out and proceeds to make his exit in some other way, he ceases to be passenger and becomes at the most mere licensee. It makes no difference that he goes where others have gone before him unless there is invitation express or implied on the part of carrier, see CARRIER; NEGLIGENCE, 35.

If in such case he is killed by reason of negligence of employees of railroad, his administrator cannot recover because he was not a passenger nor an invited person, see *post*, 35.

See also *post*, 32, 34.

Invited Person.

Right of passenger to make use of platform of railway station with relation to danger of injury from acts of express companies and others making use of platform, see *post*, 32, 34.

Injury by railroad to one invited, not a passenger, see *post*, 47.

Who is not, see CARRIER; *post*, 35.

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Passenger.

Who is not, see CARRIER.
Injury to passenger, see *post*, 19–25, 35.

Employer's Liability.

Notice of accident.

4. At the trial of an action of tort under R. L. c. 106, §§ 71, 73, by the administratrix of one alleged to have been fatally injured while in the employ of the defendant, it appeared that the plaintiff was a sister of the intestate, whose mother was living, and that she, with the mother's assent, was appointed administratrix in May of a certain year. The injury to the intestate occurred in January of the same year. The plaintiff, in order to prove the notice required by R. L. c. 106, § 75, introduced in evidence a letter, written in March of that year, which set forth the details of the injury and was received by the defendant as required by the statute, but which was signed in his own name by one who, although he was the attorney of the sister who afterwards was appointed administratrix and sent the letter with her authority, was no relative of the intestate. *Held*, that the notice was insufficient because it was not given by any one of the persons specified by R. L. c. 106, § 75. *Lukkonen* v. *Fore River Ship Building Co.* 586.

5. The right of the administrator of one whose death has resulted from one of the causes mentioned in R. L. c. 106, § 71, to give to the intestate's employer the notice required by § 75 of that chapter, in case the intestate has died without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, is not vested in the administrator until he is appointed. *Ibid.*

Action by father for consequential damages.

Employers' liability act gives no remedy to father for expenses of medical attendance to minor son injured by cause within scope of act, see EMPLOYERS' LIABILITY ACT.

Assumption of risk.

6. At the trial of an action by one employed in a cotton mill to recover for personal injuries alleged to have been received by the plaintiff by reason of a failure of the defendant to warn him of the dangerous character of a machine upon which he was working, there was evidence tending to show that the plaintiff had been set to work before the accident by a superintendent of the defendant at cleaning rapidly revolving cylinders of carding machines, no one of which had attached to it an appliance called a licker-in, that a licker-in was another smaller cylinder with teeth upon it, which revolved on a separate axis outside of and in the opposite direction from, but close to, the main cylinder which the plaintiff was cleaning; that just before the accident the plaintiff was set to work cleaning the cylinder of a machine which had a licker-in that was wrapped up so that he could see only the wrappings, that he never had seen a licker-in and did not know of its character; that the superintendent who set him to work upon the machine with the licker-in had not warned him of its character, but had

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delegated the duty of instructing him to one who was not in the employ of the defendant, and that such person had not warned him of the character of the licker-in; that, while he was cleaning the main cylinder as he had been told to do, a stick that he was using slipped and his hand was drawn between the cylinders and was injured on the teeth of the licker-in. *Held*, that the questions, whether the plaintiff was in the exercise of due care, whether there was an obvious risk of injury or one which he assumed, and whether the defendant was negligent as alleged, were for the jury. *Heffernan* v. *Fall River Iron Works Co.* 28.

7. In an action at common law by a boy against the proprietor of a woolen mill in which he was employed, for injuries incurred from falling into a vat of boiling water while the plaintiff was engaged in mixing dye powders in a pail one foot away from the vat, which when mixed were to be put into the boiling water to make dye, it appeared that the vats, which were without covers, were put into the mill three months after the plaintiff entered the defendant's employment, but that the plaintiff had continued to work there about eight months after the vats were installed in the mill without covers. The plaintiff offered to prove that the vats were made by the defendant, that covers were made for them, that the plaintiff had helped to carry the vats up to the room where they were installed, that he asked the overseer whether he should bring up the covers, and that the overseer had said no, that they would not use the covers, and that the covers never were used while he was at work there. This evidence was excluded. *Held*, that the exclusion was right; that the plaintiff by continuing to work after the vats were installed without covers assumed the risk of any accident caused by the absence of covers in the same way that he would have assumed it if the vats had been installed without covers before he was employed; and, moreover, that, in the absence of evidence to that effect, it could not be assumed that if the covers had been in use they would have been on the vats at the time of the accident, when the making of the dye had begun and the vat into which the plaintiff fell had been filled with boiling water to receive the dye powders which were being mixed in a pail within a foot of the vat to be poured into it and boiled there as soon as the mixing was finished. *McTiernan* v. *American Woolen Co.* 238.

8. In an action by an engineer in a wire cord factory against his employer for personal injuries, it appeared that the plaintiff had worked as an engineer for eighteen or nineteen years and had been employed as an engineer in the defendant's factory for about eighteen months and at times had served as a helper to the superintendent, that the superintendent sent him to get something from a storeroom in the basement of the factory, which was low, dimly lighted and very noisy from machinery both there and on the floor above, that in order to go to the storeroom he had to stoop to pass under the shaft of a blower which was two and a half or three feet from the ground, that, when he passed under the shaft, it was not in motion, that on his return from the storeroom he attempted to pass under the shaft in the same way, but it had been started, by the superintendent who sent him to the basement, and was making three hundred and twenty revolu-

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tions a minute, that the light was so dim and the noise so great that the plaintiff did not see or hear that the shaft was in motion, and had heard no signal of its starting given by a bell or orally, and as he stooped to go under the shaft two set screws in the coupling of the shaft caught the clothing at the back of his neck and he was whirled around the shaft and was injured. There was a regulation that this shafting should not be started without a signal being given by an electric bell or orally, but the plaintiff testified that while he was in the basement he was not within hearing distance of the bell. It appeared that the blower was used to heat the factory, and that the accident happened in midwinter. The plaintiff testified that while the blower was in use, through the cold weather, he had to go down into that part of the basement half a dozen times a day to change the steam, that he oiled the bearing on the blower sometimes once a day and sometimes once in two or three days, that the blower was about twelve feet from the shaft, that he knew the shaft was there, but never had been close to it and had no knowledge that there was a coupling on it that had projecting set screws. *Held*, that as matter of law the plaintiff could not recover, the dim light and the noise in the basement and the set screws in the coupling of the shaft being permanent and obvious conditions of his employment, with which he was or might have been familiar, and of which he accepted the risk; moreover, that there was no evidence of negligence on the part of the superintendent in starting the shafting of the blower when he had sent the plaintiff to the basement, as he reasonably could not have been expected to foresee that an experienced employee so often in this part of the basement would not be guided by his usual experience at this season of the year as to finding the blower shaft in motion; and that whether the signal by electric bell or orally was given or not was immaterial, as the plaintiff could not have relied on the absence of the signal, knowing that he was where he could not hear it if given. *McKenna* v. *Gould Wire Cord Co.* 406.

9. When an experienced lineman in the employ of an electric light company is working, as one of a gang of men under the direction of a superintendent of the company, in substituting new electric wires on the poles of the company for others which are dangerous for want of proper insulation, the workmen being aware of the cause of the replacement and knowing also that while the reconstruction is in progress the company will supply electricity for lighting through the old wires upon the poles on which they are working, it is not the duty of the company, or of its superintendent in charge of the work, to warn or instruct such a lineman in regard to the perils of his employment, which he knows as well as his employer or the superintendent, especially where the lineman is permitted to perform the work in his own way with an opportunity for unrestricted observation of his dangerous environment. *Pembroke* v. *Cambridge Electric Light Co.* 477.

Employee of painter who is told to get from storeroom three thirty foot falls does not assume, as matter of law, risk that one of the only three falls of required length contains concealed defects, see *post*, 14.

See also *ante*, 2.

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Negligence (*continued*).

Superintendence.

10. In an action under the employers' liability act for personal injuries alleged to have been caused by the negligence of a superintendent of the defendant in failing to warn the plaintiff of the approach of a travelling crane which cut off the ends of two of the plaintiff's fingers while he was standing on a narrow piece of iron and steadying himself by taking hold with one hand of the track of the crane, above a girder which he with another workman had been sent to strengthen by putting a bracket beneath it, it appeared that the fellow workman of the plaintiff went away temporarily and that a superintendent in charge of the work came up to take his place and stood in the same way that the plaintiff did, that the crane came over the track at irregular times, that the plaintiff's back was toward the crane as it approached and that the superintendent was facing it. There was evidence on which it could have been found that it was part of the duty of the superintendent to warn workmen who were in exposed positions of the coming of the crane. There was testimony that he had given such warnings repeatedly during the progress of the work then going on, and also that he could have seen the crane as it was coming. It appeared that the place was very noisy, and that the plaintiff could not hear nor see the approach of the crane while he was working below the girder. *Held*, that the superintendent was not relieved from the obligation to use due care for the safety of the employees by temporarily taking the place of the plaintiff's fellow workman to assist in putting up the bracket, and that it was a question for the jury whether the superintendent was negligent in failing to discover the approach of the crane and to warn the plaintiff of his danger; *also* that it was a question for the jury whether the plaintiff was in the exercise of due care. *Jordan* v. *New England Structural Co.* 43.

At common law superintendent is fellow servant of subordinates, see *post*, 11.

Failure of superintendent to warn employee of danger of injury from certain device on machine may be negligence, see *ante*, 6.

There is no duty upon superintendent of experienced linemen working near exposed wires which carry heavy currents to warn them of danger of coming into contact with such wires, see *ante*, 9.

It may be negligence upon part of superintendent to direct employee to go to a store room and select appliances of certain type where there are only the required number and one of them contains hidden defects, see *post*, 14.

For circumstances in which it was held not to have been negligence on part of superintendent as regards plaintiff to start machinery without sounding regular warning signal at a time when plaintiff was in dark cellar in which there was much exposed shafting, see *ante*, 8.

Fellow servant.

11. At common law an employee has no remedy for an injury caused by the negligence of a superintendent of his employer who is his fellow servant. *Jordan* v. *New England Structural Co.* 43.

12. In an action at common law by a boy against the proprietor of a woolen mill in which he was employed, for injuries incurred from falling into a

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vat of boiling water while the plaintiff was engaged in mixing dye powders in a pail one foot away from the vat, which when mixed were to be put into the boiling water to make dye, if it appears that the floor, which was covered with zinc, might have been slippery owing to the negligence of a fellow servant of the plaintiff in dropping soft soap on it, and that, whether the floor was slippery or not, another fellow servant of the plaintiff gave him a push or "jolt" so hard that he whirled around two or three times, slipped on the floor and fell into the vat, there is no ground for holding the defendant liable for either of these acts or for both of them combined. *McTiernan* v. *American Woolen Co.* 238.

Superintendent is not relieved of duty to use care for safety of employees by temporarily taking place of workman to assist in work, see *ante*, 10.

Defective or dangerous machinery or appliances, see *ante*, 2, 6, 8, 13, 14.

Exposed shafting.

Danger of being caught in shafting exposed in dark cellar held to have been an obvious risk of employment, see *ante*, 8.

Duty to warn.

Whether defendant was negligent in failure properly to warn employee of danger of being caught by device attached to carding machine which he was set to clean, held to be question for jury, see *ante*, 6.

Duty of superintendent to warn employees of approaching danger, see *ante*, 10.

No duty to warn experienced lineman working near wires carrying heavy current, see *ante*, 9.

Ways, works and machinery.

13. Where the employees of a painter constructed a staging, for use on a certain job, from blocks, falls, ropes and ladders furnished by him for permanent use on that and other jobs, the mere fact that the method of using the parts was that, after having been used on a job, they were separated and not reassembled until again needed for a staging, does not make the staging so temporary a structure as not to be a part of the ways, works and machinery of the employer within the meaning of R. L. c. 106, § 71, cl. 1. *Donahue* v. *Buck & Co.* 550.

14. The declaration in an action of tort by an employee against his employer to recover for personal injuries contained counts under R. L. c. 106, § 71, cl. 1, 2, alleging defects in the ways, works and machinery used by the defendant and negligent superintendence, and counts at common law alleging defective appliances and failure to instruct and warn the plaintiff thereof. At the trial it appeared that the plaintiff's injury was due to the falling of a staging upon which he was working as a painter. The defendant made his stagings from blocks, falls, ropes and ladders which he kept for that use, the parts being assembled when needed for a job and taken apart when the job was finished and kept in his shop until again needed. The plaintiff had been instructed that blocks and falls to be used were hung on pegs in a certain room, and that defective ones were marked as condemned and kept in a pile on the floor. The plaintiff and a fellow

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workman were directed by the defendant's superintendent, who had general charge of its business, to procure three blocks and falls of a certain length for the staging in question and, going to the room where blocks and falls were kept, found only three of the required length hanging on pegs, although there also were three others of greater length upon the pegs, and delivered the three of the required length to the superintendent who sent them to the place where the work was to be done, but did not go himself. The assembling of the parts and the construction of the staging were done by the plaintiff and his fellow workmen. There was testimony by an expert that the staging fell because a rope strap on one of the blocks broke due to its being worn or chafed inside and its fibres having become somewhat "weathered" or rotten by chafing where they came in contact with the block. *Held*, that there was evidence for the jury from which they would have been warranted in finding for the plaintiff, either on the ground that there was a defective condition of the ways, works and machinery, or appliances of the defendant due to his negligence, or on the ground that there was negligence on the part of the superintendent for which the defendant was liable; and *also* that it could not be said as a matter of law either that the plaintiff was negligent or that he assumed the risk of the injury. *Donahue* v. *Buck & Co.* 550.

15. At the trial of an action of tort brought against the proprietor of a coal shed by one employed therein, in which the plaintiff sought recovery for injuries received by reason of the falling upon him of a wheelbarrow of coal alleged to have been due to a defect in a runway upon which a fellow workman, without negligence, was pushing the barrow, it appeared that the shed contained nine bins, that the runway was over seven feet wide in the clear and that its flooring consisted of two inch spruce plank laid lengthwise of the way. The barrow had two wheels forty-two inches in diameter, was about four feet and a half wide between the outside of the hubs, and weighed, with its load, about fifteen hundred pounds. There was no evidence of the width of the tires of the wheels of the barrow. The alleged defect in the runway was a worn place about ten inches long, one and one quarter inches wide and one half of an inch deep, and there was evidence which tended to show that, because of it, the barrow was caused to deflect and run over the side of the runway and fall upon the plaintiff. *Held*, that there was no evidence of negligence on the part of the defendant, since he could not reasonably have anticipated that so slight a depression in the plank would cause such a deviation of the barrow. *Landrigan* v. *Taylor-Goodwin Co.* 582.

Double employment.

Whether at time of accident plaintiff was servant of mill owner or of machinist whom he was sent to assist, see AGENCY, 1.

Causing death.

16. "The negligence of an employer himself" for which he is liable under R. L. c. 106, § 73, if it results in the instant death or death without conscious suffering of an employee, does not include the negligence of one to whom the employer has delegated the duty of maintaining machinery in a

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safe condition, for which, among other things, the employer is made liable by the succeeding words of the same section. *Rowley* v. *Ellis*, 391.

See also *ante*, 4, 5, 9; *post*, 17.

Farm laborer.

17. Under § 79 of R. L. c. 106, which provides that "the provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employees," a foreman in charge of one of four farms belonging to the same owner, under the direction of a superintendent who visits each farm once a day, such foreman receiving a salary of $35 a month and having sixteen or eighteen men under him, is a farm laborer within the meaning of the statute, and, if he is killed without conscious suffering by the violent breaking of the sprocket chain of a cutting machine when he is showing the workmen how to feed cornstalks into the machine, his widow cannot recover from his employer for his death under the provisions of § 73 of the same chapter, although she shows that the accident was caused by the sprocket around which the chain passed having become worn by use, that the duty of inspecting and caring for the safety of the cutting machine was entrusted to the superintendent, and that the superintendent was negligent in not discovering the defect and causing the necessary repairs to be made. *Rowley* v. *Ellis*, 391.

Cause of accident matter of conjecture.

Case where cause of action was pure matter of conjecture requiring verdict for defendant, see *post*, 49.

Violation of Ordinance as Evidence of Negligence.

18. In an action for personal injuries by a foreman in the employment of the water department of a city against the owner of a horse and wagon, whose driver negligently started the horse suddenly, thereby causing the wagon to strike the temporary railing of a temporary bridge and push it against the plaintiff so as to knock him off the bridge, it appeared that the bridge had been constructed the day before under the direction of the plaintiff at a junction of two public streets, in order to provide a passage for travellers over a trench which had been excavated by men under the charge of the plaintiff, that an ordinance of the city prohibited the excavation or obstruction of any street of the city without a permit from the superintendent of streets, that the plaintiff received his orders from the superintendent of the water department, that a permit for the work had been issued by the superintendent of streets to the water department, but there was evidence that it had expired by its limitation before the day of the accident and had not been renewed. The defendant contended that for this reason the plaintiff was not rightfully on the bridge in the course of his duties and therefore could not recover. *Held*, that, although the violation of the ordinance might be considered by the jury as evidence of negligence, the fact that the plaintiff was engaged upon the work without a permit was not necessarily the direct and proximate cause of his injury nor was he obliged to found his action upon his violation of law, and that it was a question for the jury whether the plaintiff's

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violation of the ordinance, in view of the other evidence in regard to the plaintiff's conduct, showed such negligence as to preclude him from recovery. *McCarthy* v. *Morse*, 332.

Boy run over by wagon negligently driven who, before the accident, had been playing in street in violation of city ordinance may recover, unless unlawful play was direct and proximate cause of accident, see *post*, 44.

Violation of Rules as Evidence of Negligence.

Questions arising upon plaintiff's offering book of rules of defendant company in order to show their violation as evidence of negligence, see EVIDENCE, 13.

Street Railway.

Injury to passenger.

19. It is the duty of an electric railway company which maintains a station in a subway in a city to keep the stairways by which passengers enter and leave the station in a reasonably safe condition for travel. *MacLaren* v. *Boston Elevated Railway*, 490.

20. Evidence tending to show that a stairway in a station of an electric railway in a subway in a city, which was used by passengers as a means of exit from the station, was equipped with a suitable tread, but was allowed by employees of the company operating the railway and maintaining the station to become muddy and slippery, and that a passenger in leaving the station slipped upon the mud and was injured, will warrant a verdict for the plaintiff in an action of tort by such passenger against the railway company to recover for the injuries received by reason of the fall, because it would warrant a finding that the defendant did not maintain the stairway in a reasonably safe condition. *Ibid.*

21. It is no evidence of negligence on the part of the conductor of a street car that under circumstances in no way unusual he gave the signal to start the car after a healthy and unincumbered woman passenger had got fully and fairly upon the car and was proceeding to walk to a seat. *Sauvan* v. *Citizens' Electric Street Railway*, 176.

22. In an action against a corporation operating a street railway for personal injuries, if it appears that the plaintiff's injuries were caused by a car of the defendant in which the plaintiff was a passenger leaving the rails near the edge of an embankment seven feet high, going off the bank and turning over on its side in a street below, and this accident is unexplained, the doctrine of *res ipsa loquitur* applies, an inference being justified that the defendant was at fault, and this inference being the same if the car was in good condition at the time of the accident. *Minihan* v. *Boston Elevated Railway*, 367.

23. In an action against a corporation operating a street railway for personal injuries caused by a car of the defendant in which the plaintiff was a passenger leaving the rails near the edge of an embankment seven feet high, going off the bank and turning over on its side on a street below, where the accident was unexplained, the plaintiff put in evidence the answers of the defendant's president to interrogatories filed by the

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plaintiff containing testimony that the car had been inspected shortly before the accident and was in good condition. There was no evidence in the case in addition to the answers to the interrogatories except the fact of the accident. The defendant asked the judge to instruct the jury that there was no evidence of negligence on the part of the defendant or of its servants or agents in regard to the inspection of the car, and that there was no evidence from which the jury would be warranted in finding the existence of any defect in the car or its apparatus at the time of the accident. *Held*, that these instructions should have been given, not because the plaintiff was estopped to contradict the answers of the defendant's president in regard to the inspection and good condition of the car, but because no such evidence in contradiction was introduced, and the happening of the accident, although evidence of negligence of some kind on the part of the defendant, was not evidence of negligence in failing to keep the car in good condition. *Minihan* v. *Boston Elevated Railway*, 367.

24. In an action against a corporation operating a street railway for injuries incurred, while being transported as a passenger in a car of the defendant, from the car being struck in the rear by a freight train at a switch and pushed around the switch into another street car which had come from the opposite direction and was waiting for a chance to cross the switch, there was evidence that before the accident the freight train was approaching on its track at the rate of about three or four miles an hour, and that the street car from the opposite direction had stopped at a switch to let the train pass over the junction of the tracks. There was no evidence of any obstructions in the street. *Held*, that the jury were warranted in finding that the defendant's motorman, before he crossed the track of the freight railroad, ought to have seen the freight train coming on that track and also the street car approaching from the opposite direction and ought to have known the arrangement of the tracks and switches and have known that if he put his car where he did it might be caught in a trap as it was, that his stopping the car in the wrong place was the cause of the accident, and that it was a question for the jury whether in driving the car to the place where it was stopped he exercised the highest degree of care that was reasonable under the circumstances. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

25. At the trial of an action against a street railway company under R. L. c. 111, § 267, to recover for the death of a woman which was alleged to have been caused, while she was a passenger on a car of the defendant in an evening in early October, by reason of gross negligence on the part of the conductor of the car, there was evidence which tended to show that the plaintiff's intestate, just before the accident, was sitting in a closed car near the front door, that there were not more than fourteen other passengers, that, after she and two others had signalled for the car to stop, she remained in her seat until it came to a full stop, when, the other passengers leaving by the rear door, she, with bundles in her hands, pushed the front door open with her shoulder, passed out on to the front platform and was getting off the car when the conductor gave the starting

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signal, the car started and she was thrown, receiving injuries from which she afterwards died. The conductor all the time was at his place at the rear door. *Held*, that there was nothing to show such knowledge on the part of the conductor of the movements of the plaintiff's intestate, or such failure on his part to perform his ordinary duties under the circumstances as to indicate the gross negligence which, by R. L. c. 111, § 267, is made essential to the maintenance of the action. *Lanci* v. *Boston Elevated Railway*, 32.

Where negligent act of street railway employee in operating car contributes to causing collision with railroad train which also is negligently handled, passenger on street car who is injured can sue the two corporations, jointly, see *post*, 46.

If rate of speed at which street car was moving at certain time is material and there is no direct evidence upon the issue, it may be assumed that it was moving at rate of speed usual at place in question, see EVIDENCE, 15.

Injury to one on highway.

26. At the trial of an action against a street railway company to recover for personal injuries received by the plaintiff by reason of a collision on the highway between a wagon that he was driving and a car of the defendant, the evidence introduced by the plaintiff tended to show that he was seventy years of age and of good eyesight and hearing, that, at four o'clock on a hot afternoon in September, he was driving slowly on a highway, in which were tracks of the defendant, a horse, which was slow by nature and tired from hard work, attached to a heavy, empty and noisy coal wagon which had no cover, hood or awning of any kind; that, intending to cross the tracks, which were at the extreme left of the road, in order to enter a street on that side, he stopped his team five feet from them and looked in both directions and listened, but neither saw nor heard any car; that thereupon he started slowly across the tracks, and, when part way across, saw a car approaching on his left very fast; that, although he tried to get out of the way, the car struck the left hind wheel of his wagon, broke both wheels and various other parts of the wagon and went on for more than its length before it stopped; that, just before the accident, the speed of the car was increased and it was moving rapidly, and that the motorman was inexperienced. It also appeared that, from the place where he stopped before crossing the track, the plaintiff could see in the direction from which the car came at least three hundred feet. The defendant relied upon evidence which tended to contradict that of the plaintiff, and also to show that, before the collision occurred, the car was going very slowly. *Held*, that there was evidence for the jury from which they were warranted in finding that the plaintiff was in the exercise of due care and that the defendant was negligent. *Le Baron* v. *Old Colony Street Railway*, 289.

27. At the trial of an action of tort against a street railway company to recover for injuries received by the plaintiff, while she was riding in a sleigh driven by another person, because the horse ran away owing to the fact that, when the sleigh was being driven between the street railway tracks,

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one of its runners became caught in a switch, there was evidence tending to show that, at the time of the accident, because of the way in which snow was thrown by the defendant from its tracks into the roadway at the sides of the tracks, driving and passing in the roadway were very difficult and the tracks instead of the roadway were being used by travellers upon the highway with vehicles, that, after the sleigh became caught in the switch, two of the occupants other than the plaintiff sought to loosen it, the horse became restless because of their efforts and ran away, and the plaintiff was thrown out and injured. There also was evidence tending to show that there had been snow storms of unusual frequency and severity and cold weather very nearly continuously. *Held*, that there was evidence from which the jury would be warranted in finding that the accident happened by reason of negligence of the defendant, and that the plaintiff's injuries resulted therefrom. *Miller* v. *Boston & Northern Street Railway*, 535.

28. If a woman on a November morning before daylight is following a path, leading to the mill where she works, which passes through vacant land and then crosses a street in which there is a street car track, and if a car, which then is eight hundred and fifty feet from the point of crossing, is approaching "very fast" lighted by thirteen incandescent lights inside and one on the dashboard, and the woman has an unobstructed view of this car which continues to be unobstructed until she reaches the crossing, and she then walks in front of the car and is run over, in an action to recover for her injuries, it does not help her to testify that she looked and saw no car coming, for, unless she intended to be injured, she either did not look or else looked carelessly. Following Fitzgerald *v.* Boston Elevated Railway, 194 Mass. 242. *Beirne* v. *Lawrence & Methuen Street Railway*, 173.

29. In an action for personal injuries from being run over by an electric car of the defendant as the plaintiff was on her way to work early on a November morning before daylight, if it appears that for about a year before the accident the cars of the defendant were equipped with search lights in front and that the car which ran over the plaintiff had no search light lighted, but had a small incandescent headlight and had thirteen incandescent lights inside, the fact of the absence of the search light is immaterial unless it also appears that the plaintiff knew of the previous use of search lights and relied on the absence of a search light, and if she testifies that when she used to see the car in the month before the accident it "had a small light on it" and that she supposes that at the time of the accident the lights inside were lighted but cannot say whether they were or not, this shows that she did not rely on the absence of a search light. *Ibid.*

30. A girl nine years of age, in crossing a street in which there was a double line of street railway tracks, which she had been accustomed to cross at that point frequently every day for two years, saw a car standing on the track nearer her and a car rapidly approaching on the farther track, and, with an opportunity continually to see the car on the farther track and having it in mind, she attempted to cross in front of it after the car nearer her had moved on, thinking that she had time to get across, if she hurried,

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and meaning to run if she had to. She was run into and injured. Her parents often had told her not to take the risk that she did take. *Held*, that she could not be said to be in the exercise of any care. *Casey* v. *Boston Elevated Railway*, 440.

31. At the trial of an action of tort against a street railway company to recover for injuries received by the plaintiff from being run into by a street car of the defendant, it appeared that the plaintiff, when run into, was at work in the street where the car ran and was in the employ of a contractor who was placing crushed stone on the surface of the street from the curbing of the sidewalk to within eighteen inches of the car track, that the car of the defendant did not overhang the street from the track eighteen inches, that cars approaching could be seen for over two hundred feet from the place where the plaintiff was standing, that the plaintiff neither saw nor heard the car before it struck him and was not thinking at all whether he was so near the track that a car might hit him, that, when struck, he was facing in a direction away from the car but could not tell whether he was walking toward the track or away from it, and that the accident happened at about noon on a bright summer day. The plaintiff testified that he had noticed "it was customary for cars to ring their gongs when men were near the track, but that for hours at a time he would not notice whether the cars rang their gongs or not, but that when he did notice, they did so when men were near the track." *Held*, that there was no evidence that the plaintiff was in the exercise of due care; and *also*, that the evidence fell far short of indicating any established custom on the part of the employees of the defendant as to the ringing of gongs, and of showing any excuse for the failure of the plaintiff to use his own senses for his protection. *Kelly* v. *Boston Elevated Railway*, 420.

Causing death, see *ante*, 25.

Elevated Railway.

Duty to keep stairways used by passengers as entrances and exits at stations in reasonably safe condition, see *ante*, 19, 20.

On Platform of Railroad Station.

32. Whether or not one, who is intending to take a train in a railroad station, is in the exercise of due care in the use of the platform between the trains, and is, in his relation to an express company using hand trucks on the same platform, within his rights as an invited person, or is a trespasser or a mere licensee, depends upon what use of the premises is reasonably necessary under the circumstances as they appear to him at the time, not under the circumstances as they are in fact. *Clark* v. *American Express Co.* 160.

33. No exception lies to the refusal of the judge presiding at the trial of an action of tort against an express company for personal injuries received by the plaintiff by reason of his being run into by a hand truck of the defendant on the platform of a railroad station as he was about to take

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a train, to rule that "there was obvious danger in the vicinity of the express and baggage cars by reason of the number of employees and trucks moving in both directions and handling baggage at a time shortly before the train was scheduled to start," that being one of the matters for the jury to consider in passing upon the question whether the plaintiff was negligent. *Clark* v. *American Express Co.* 160.

34. At the trial of an action of tort against an express company to recover for personal injuries which the plaintiff received by being run into by a hand truck of the defendant as he was about to take a train in a railroad station, there was evidence warranting the jury in finding that the plaintiff intended to get upon the smoking car which he expected to find at the front of the train. There were thirteen cars on the train, and the smoking car was the fifth car from the rear and the eighth from the front of the train, but he passed it by without seeing it and went forward on the station platform, also passing some day coaches and Pullman and private cars, until he came to a series of baggage and express cars, when, without looking behind and without stepping out of his direct course, he leaned to the right to see where the smoking car was, and was run into from behind by the truck. The plaintiff testified that he knew "that the smoking car is never ahead of the baggage cars," that he knew that some of the cars had signs hung on them, and that he saw a number of trucks about which were being unloaded on to the train. *Held*, that there was evidence warranting the jury in finding that the plaintiff was where he had a right to be, that he was in the exercise of due care, and that he was injured by negligence of the defendant's employees; *also* that he was not as matter of law guilty of contributory negligence in not looking behind before he leaned over to look forward. *Ibid.*

See also *post*, 35.

Railroad.

Injury to licensee.

35. If a passenger, who has alighted from a train at a station of a railroad corporation where a safe and ample plank walk is provided for exit to the highway, after walking upon it until he nearly has reached the highway, deliberately leaves it and steps down about thirteen inches into a space where sleepers lie uncovered and proceeds to cross a track where he is struck and killed by a train approaching in full view, the administrator of his estate cannot recover for his death as that of a passenger, because he ceased to be one when he left the plank walk, nor as that of a person invited to cross the track, because he was not so invited, and also cannot recover because the intestate was negligent in stepping in front of the approaching train. *Legge* v. *New York, New Haven, & Hartford Railroad*, 88.

Injury to invited person.

Injury to one not employee loading freight on car under direction of station agent, see *post*, 47.

Injury to passenger walking on platform of railroad station who is run into by truck pushed by employee of express company, see *ante*, 32–34.

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Injury to traveller on highway at grade crossing.

36. At the trial of an action of tort against a railroad company to recover for personal injuries received by the plaintiff by reason of a collision between an ice wagon which he was driving and a train of the defendant at a grade crossing of the railroad with the highway, it appeared that, at a distance of twenty-five feet from the crossing, there was a clear view of the track in the direction from which the train came for seven hundred and sixty-six feet, that the accident happened about noon on a clear day in May, that previous to the collision the plaintiff had been driving the ice wagon for about four hundred feet in a highway nearly parallel to and near to the railroad track from the same direction from which the train approached, that the wagon was partly filled with ice and was covered so that the plaintiff could see in no direction excepting in front unless he leaned forward from his seat. The plaintiff testified that, when about twenty-five feet from the crossing, he leaned forward and looked up the track in the direction from which the train came and saw no train, that he was familiar with the neighborhood and with the crossing, knew that there was a train due about that time but thought that it had passed, that his horses were walking and could have been stopped within ten feet until just as they reached the crossing, when they suddenly broke into a trot, and the train of the defendant, going at the rate of about twenty miles an hour, struck the wagon. *Held*, that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of due care. *Allen* v. *Boston & Maine Railroad*, 298.

37. Where, at the trial of an action of tort against a railroad company to recover for personal injuries received by the plaintiff by reason of a collision between an ice wagon, which he was driving, and a train of the defendant at a grade crossing of the railroad with a highway, the admitted physical surroundings of the crossing, the time and the atmospheric conditions were such as to show ample opportunity for the plaintiff, who had good eyesight, by looking, to ascertain in time to protect himself from danger whether a train was approaching, it is not enough, in order to furnish evidence sufficient to warrant the submission to the jury of the question whether the plaintiff was in the exercise of due care, for him to say that he looked but failed to see an approaching train. *Ibid.*

Tracks laid in highway.

38. At the trial of an action of tort against a railroad company for personal injuries received by the plaintiff through being run over by a train of the defendant, it appeared that, at about three o'clock on a morning when there was no moon, a box freight car was being pushed by an engine at the rate of three miles an hour on a spur track owned by a private person which was upon the side of a street, on the right hand as the car proceeded, that a foot path or sidewalk lay to the right of the track, that the street was in a business district of a city near a wharf where there were but few dwelling houses and where hardly any traveller would pass after nightfall. The car and engine were the property of the defendant and at the forward end of the car as it proceeded were two employees of the de-

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fendant, each with a lantern, who were keeping a lookout on the track in front. The plaintiff was lying unconscious just outside of the right hand rail with his body at right angles with the rail and only his arm extended across it. Eight feet back from that rail was a line of fence and buildings. The train was being preceded down the track, as was customary, by an employee of the person who owned the track for the purpose of warning travellers of its approach. The defendant's employees did not see the plaintiff until it was too late to prevent running over his arm. *Held*, that there was no evidence for the jury on the question of the defendant's negligence. *Johnson* v. *Guffey Petroleum Co.* 302.

89. At the trial of an action of tort against one who maintained a spur track for use in connection with his mercantile business, running from the main line of a railroad upon the side of a public street through a business district containing few dwelling houses and leading to wharves, to recover for personal injuries alleged to have been received by the plaintiff by reason of negligence on the part of an employee of the defendant whose duty it was to see that there were no obstructions upon the track and to precede cars and engines running thereon to warn travellers in the street, either on foot or in vehicles, so that no injury should be caused to them, it appeared that the plaintiff was run over by a box freight car which was being pushed down the track by an engine at the rate of three miles an hour at three o'clock on a morning when there was no moon, that, when run over, the plaintiff was lying unconscious just outside of the rail at the right as the train proceeded, with his body at right angles with and only his arm extended across the rail, that the travelled part of the street was wholly at the left of the track excepting a narrow footpath on the right, about eight feet beyond which was a line of fence and buildings, that the defendant's employee within half an hour had passed over the track with a lantern, walking between the rails, and that at that time the plaintiff was not there, that, as the train proceeded, the defendant's employee preceded it, keeping about one hundred feet in front, with his lantern, but walking in the street to the left of the track, and that he passed by the point where, on the other side of the track, the plaintiff lay with his arm across the rail, and did not see him, and the train, following, ran over the plaintiff's arm. *Held*, that, considering the conduct of the defendant's employee with reference to the danger which he had reason to apprehend and the kind of observation that he would be expected to make in the performance of his duty, there was no evidence from which the jury would be warranted in finding that either he or the defendant was negligent. *Ibid.*

Injury to passenger on street car struck by train.

Where negligent act of employee of railroad in operating train contributes to causing collision with street car which also is negligently managed, passenger on street car who is injured can sue the two corporations jointly, see *post*, 46.

Violation of rules as evidence of negligence, see EVIDENCE, 18.

Causing death, see *ante*, 35; *post*, 47.

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Express Company.

Injury to passenger walking on platform of railroad station who is run into by truck pushed by employee of express company, see *ante*, 82–84.

See also *post*, 48.

In Use of Highway.

40. A traveller on a crowded sidewalk of a city street is not necessarily negligent in stepping into an open coal hole, although he sees a coal team backed up toward the building to which the coal hole belongs and a man shovelling scattered coal out of the gutter. *Wakefield* v. *Boston Coal Co.* 527.

41. It is the duty of a coal dealer who uses a coal hole in a sidewalk in delivering coal to a customer, to use proper precautions to protect pedestrians from personal injury, and he is not relieved from the performance of this duty because of a corresponding duty on the part of his customer who maintains the coal hole. *Ibid.*

42. A teamster employed by a coal dealer, who is sent to deliver coal and on asking where to deliver it is told by the purchaser to put it in a coal hole in the sidewalk, in using the coal hole after this direction is none the less acting within the scope of his employment as a servant of the coal dealer, who is liable for injuries caused by the servant's negligence in leaving the coal hole open and unguarded. *Ibid.*

43. If a boy ten years of age has been playing ball in a street in violation of a city ordinance, and before he has left the street is run over by a delivery wagon negligently driven and is injured, his violation of the ordinance does not prevent him from recovering in an action against the owner of the wagon, unless such violation was a direct and proximate cause contributing to the accident, and if he was injured after he had abandoned the game and had started to travel home, the fact that his previous unlawful play was the reason for his being in the street does not make it a direct and proximate cause of the accident. *Jaehnig* v. *J. G. & B. S. Ferguson Co.* 364.

44. In an action by a boy ten years of age, when injured, against the owner of a delivery wagon, which ran over the plaintiff when being driven rapidly and negligently by a servant of the defendant around the corner of a cross street into a street where the plaintiff had been playing ball contrary to a city ordinance, there was evidence that the game consisted in bowling the ball and trying to catch it when it was returned, that the shop of the plaintiff's father was near by on the street, that the father had called twice to the plaintiff, and that, after the second call, the ball was bowled toward the plaintiff and went by him in the street, that he started walking in the direction of his father's shop which was also in the direction of the ball, a few feet away from him, and that, before he had gone as far as the place where the ball was, he was struck by the wagon and was injured. In one part of his testimony the plaintiff said that he gave up the game and started for the place where his father was standing and where his father's shop was. It did not appear that there was much

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travel on the street. *Held*, that it was a question of fact for the jury whether the plaintiff had given up the game before he started to take the three or four steps which brought him in collision with the defendant's wagon, and that, if the jury found for the plaintiff on that point, it also was a question for them whether the plaintiff's general conduct in reference to danger from teams on the street was that of ordinarily careful boys of his age. *Jaehnig* v. *J. G. & B. S. Ferguson Co.* 364.

45. In an action by a woman against a town for an injury caused by an alleged defect in a little used country road, on which the defendant had made repairs within six years, having only three houses on it, in one of which the plaintiff lived, if there is evidence that the plaintiff knew of the existence of the defect but was obliged to use the road, as it was her only way of going to and from her home, and that being conscious of the danger she was trying to avoid it at the time of her injury, the question of her due care is for the jury. *Thompson* v. *Bolton*, 311.

Evidence held to warrant finding of negligence on part of street railway company in so disposing of snow as to make passage in highway very difficult except between its tracks, see *ante*, 27.

Injury to one lying unconscious across tracks of railroad laid in highway, and questions of negligence of those in charge of train, see *ante*, 38, 39.

Due care of one who went into dangerous place on bridge in performance of duty to keep it clear and, while moving obstruction, was injured by reason of defendant's negligence, see *ante*, 3.

For charge upon question of imputed negligence approved by this court, see *ante*, 1.

Due care of persons driving across railroad or street railway tracks or crossing them on foot, see *ante*, 26, 28, 30, 35–37.

Due care of workman resurfacing street who is struck by car, see *ante*, 31.

Accident to one who must have seen approaching danger had he looked carefully.

Where the physical conditions attending the running down of one riding, driving or walking on a highway across railroad or street car tracks were such that if he had looked with ordinary care he must have seen a train or car approaching, in time to protect himself, it is not evidence of his due care for him to testify that he looked but failed to see the train or car, see *ante*, 28, 30, 35–37.

Concurring Negligence of Two Defendants.

46. If a passenger in a car of a corporation operating a street railway is injured by reason of the car being stopped negligently in a place where it is run into negligently by a train of another corporation operating a freight railroad, he can sue the two corporations jointly, his injuries being the result of their combined carelessness in the simultaneous performance of unconnected duties. Following Feneff *v.* Boston & Maine Railroad, 196 Mass. 575. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

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Failure of coal dealer to use proper care to protect pedestrians from injury by falling into coal hole opened to allow him to deliver coal to building is not excused by fact that owner of the building has corresponding duty, see *ante*, 41.

Gross.

47. At the trial of an action of tort under R. L. c. 111, § 267, brought against a corporation operating a railroad by the administrator of one whose death was alleged to have been caused by reason of gross negligence of the defendant's employees, the testimony of one of the plaintiff's witnesses tended to show that the plaintiff's intestate had brought a heavy machine to a freight agent of the defendant for shipment, that the freight agent directed him to load it on to a car, and that he and other employees of the defendant and the witness helped the plaintiff to do so, that one employee of the defendant was inside of the car with a rope attached to the machine upon which he was directed to pull in order to steady the machine as it stood upon rollers or skids running to the car from the wagon from which it was being unloaded, that he started to jump and dance and whistle, and immediately the machine fell. *Held*, that there was evidence which would warrant the jury in finding that the death of the plaintiff's intestate resulted from gross negligence of an employee of the defendant. *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 578.

Evidence held as matter of law not to show gross negligence essential to recovery under R. L. c. 111, § 267, for causing death, see *ante*, 25.

Evidence that telegraph company, did not transmit beyond New York a message filed in Boston to be delivered in Australia, the sender stating that it was "very important and must be transmitted correctly," is not sufficient to prove the gross negligence which at the least is necessary to make ineffectual limitation of liability for non-delivery, see TELEGRAPH, 4; see also TELEGRAPH, 3.

Causing Death.

See *ante*, 4, 5, 9, 16, 17, 25, 35, 47.

Res ipsa loquitur.

Where car in which plaintiff was a passenger leaves rails and rolls off embankment and accident is unexplained, doctrine of *res ipsa loquitur* applies although car is shown to have been in good condition at time of accident, see *ante*, 22, 23.

But though happening of the accident is evidence of some kind of negligence it is not evidence of negligence as to particular duty to keep car in good condition, see *ante*, 23.

Proximate Cause.

Fact that reason why boy, injured by being run over, was in street was that previously he had been engaged in playing a game there in violation of city ordinance does not show necessarily that unlawful play was the proximate cause of accident so as to bar recovery therefor, see *ante*, 43.

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Whether fact that plaintiff was in charge of work carried on without a permit in violation of ordinance was proximate cause of injury held question for jury on all the evidence, see *ante*, 18.
Evidence held to warrant jury in finding that act of motorman in stopping his car in wrong place was cause of collision, see *ante*, 24.

In Stone Quarry.

See *post*, 49.

Opening in Sidewalk.

Traveller on crowded sidewalk held not negligent as matter of law in stepping into open coal hole despite presence of coal wagon at curb and of man shovelling scattered coal out of gutter, see *ante*, 40.
Duty of care on part of those using coal hole in sidewalk to protect pedestrians, see *ante*, 41, 42.

In Removal of Snow.

Evidence held to warrant finding of negligence of part of street railway with regard to disposition of snow removed from its tracks, see *ante*, 27.

In Care of Subway Station.

For evidence warranting finding that railway company failed to perform duty to keep stairway used by passengers as entrance and exit to subway station in reasonably safe condition, see *ante*, 20.

Grade Crossing.

Injury to one driving across tracks of railroad at grade crossing, see *ante*, 36, 37.

Spur Track.

Injury to one lying unconscious upon spur track laid in street, see *ante*, 38, 39.

Joint Tortfeasor.

See *ante*, 46.

Of One owning or controlling Real Estate.

Duty of one maintaining coal hole in sidewalk to protect pedestrians from personal injury does not excuse coal dealer from a like duty while using such coal hole in delivering coal, see *ante*, 41.

Where Cause of Accident is Mere Matter of Conjecture.

48. At the trial of an action against an express company to recover for injuries alleged to have been caused to the plaintiff by reason of negligence on the part of an employee of the defendant when removing a trunk from a basement where the plaintiff was employed, it appeared that the trunk was a large one and heavily filled, and that, in removing it from the basement up a flight of stairs, the employee of the defendant used a tackle

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and fall, the tackle being fastened to a handle of the trunk, that, when the trunk was part way up the stairs, it caught, the handle broke, and the trunk fell upon the plaintiff. Although the plaintiff had as good an opportunity to observe the handle of the trunk as did the defendant's employee, there was no evidence describing it or any tending to show that it was defective or worn or that there was any reason which could have been discovered upon inspection why it could not be used safely in connection with the tackle; nor did it appear how the trunk had caught in its ascent. *Held*, that there was no evidence of negligence on the part of the defendant or its employee which properly could be submitted to the jury, the cause of the accident being left wholly to conjecture. *Childs* v. *American Express Co.* 337.

49. In an action by a workman in a granite quarry against his employer for injuries from a fall into a deep pit of the quarry, near the brink of which it was the duty of the plaintiff to stand for the purpose of transmitting signals given by the foreman in charge of the work, who worked in the bottom of the pit, to an engineer in charge of a stationary engine, in an engine house on the bank of the pit, by means of which a large derrick was operated for hoisting the stones from the pit, there was no direct evidence as to what caused the plaintiff to fall into the pit and it was purely a matter of conjecture whether he was knocked into the pit by the "big pieces of bent steel" called "dogs," which hung from the end of the boom of the derrick to hold the stones when hoisted, as they swung back on their way to the pit after depositing a stone that had been hoisted, or whether he fell into the pit without coming in contact with the dogs, and, even if the plaintiff was struck owing to the swing of the dogs, there was nothing on which the jury could find that the swing was due to any negligent act of the engineer or of any one for whom the defendant was responsible. *Held*, that it was right to order a verdict for the defendant. *Brodie* v. *Rockport Granite Co.* 147.

Liability of Municipal Corporation for Defect in Highway.

See LIMITATIONS, STATUTE OF, 3; WAY, 3–12.

Damages.

Recovery in damages for mental suffering is limited to necessary or natural consequences of the physical injury which is foundation of action, see DAMAGES, 3.

For illustration of rule, see DAMAGES, 4.

Limitation of Liability for Negligence.

Limitation by telegraph company of liability for negligence, see TELEGRAPH, 2–4.

Of Holder of Check.

Negligence of holder of check in failing to present it for payment within reasonable time as bar to recovery in action upon original debt brought

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after suspension of payments by bank upon which check was drawn, see BILLS AND NOTES, 5.

Of Auditing Officer.

Negligent failure of auditing officers of city to discover embezzlement is no defense to action for money had and received against one who took proceeds of embezzlement with notice, see CONTRACT, 7.

NEWBURYPORT.

Case concerning salary of principal of Putnam Free School for the year 1898–1899, see CONTRACT, 5.

NEW TRIAL.

See PRACTICE, CIVIL, 10, 16–19.

NOTICE.

Requirements of valid notice of sale of land for non-payment of taxes, see TAX, 9.

Who may give notice of accident required by R. L. c. 106, § 75, where injured person dies without having given it and without having been for ten days of sufficient capacity to give it, see NEGLIGENCE, 4, 5.

Notice of accident must be given to insurance company in accordance with provisions of policy or there cannot be recovery by insured, see INSURANCE, 3.

One who receives check of city in payment of individual debt of city treasurer has notice on face of transaction that, in absence of express authority, check is invalid, see BILLS AND NOTES, 6.

In such case, questions of constructive notice and of practicability of inquiry are not material, see BILLS AND NOTES, 8, 9.

Where cashier of insurance company accepts checks of a city made payable to him in payment of premiums upon individual insurance policy of city treasurer, there is shown actual knowledge by cashier of invalidity of checks which is actual knowledge of defendant whose title depends upon ratification of cashier's acts and which takes case out of R. L. c. 73, § 78, see BILLS AND NOTES, 7.

Whether grantee of land in deed made expressly subject to unrecorded lease for five years which contained covenant to renew for further term of five years had actual notice of the covenant was not decided as grantee was bound by covenant irrespective of notice, see COVENANT, 5.

Where service in proceedings to marshal corporation's assets for payment of its debts was made upon corporation, shareholder who has no actual notice or knowledge of proceedings is concluded thereby, see JUDGMENT, 1.

Knowledge that one of two partners is insolvent or in contemplation of insolvency is not, as matter of law, knowledge that firm is insolvent if other partner is, at time in question, of good financial standing, see INSOLVENCY, 4.

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NUISANCE.

Public.

Maintenance of lunch wagon at one place in highway for hours at a time is obstruction of public easement which cannot be justified by license to carry on business of hawker and pedler, see WAY, 1.

Nor by permit issued by officers of municipality under color of local ordinance unless there has been legislative authority for such ordinance, see WAY, 2.

Private.

Action against individual for alleged maintenance of nuisance may be ordered tried together with action by same plaintiff against municipality for defect in highway where they depend on same facts, see PRACTICE, CIVIL, 3.

OBSTRUCTION OF HIGHWAY.

See WAY, 1, 2.

OPTION.

One who holds instrument in writing giving him option to purchase real estate upon certain terms has no interest in the real estate until he elects to purchase and gives notice of election, see CONTRACT, 4.

Holder of such option does not give notice of election to purchase under it by advertising that he will sell the property at auction upon a date three days before option expires, see CONTRACT, 3.

One remaining in possession after giving at expiration of lease notice of election under provision of lease to purchase at a price to be fixed by arbitration was held, while endeavoring in good faith to have sale consummated, to be in possession under contract of sale and not to be liable for rent, see LANDLORD AND TENANT, 8.

But right to specific performance of such contract may be lost by failure to endeavor in good faith to have sale consummated, see EQUITY JURISDICTION, 2.

OUSTER.

Of domestic corporation, from exercise of unauthorized privileges where case is not so serious as to call for forfeiture of corporate franchise, see CORPORATION, 1, 2; ATTORNEY GENERAL.

Of lessee, see LANDLORD AND TENANT, 7.

PARENT AND CHILD.

1. An alien who has a domicil in this Commonwealth, and whose wife, also an alien, is living apart from him in this Commonwealth, can be convicted on a complaint under St. 1906, c. 501, for neglecting to provide for the

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support of his minor child, although the child never has been in this Commonwealth and was abandoned by the defendant in a foreign country seven years before the complaint. *Commonwealth* v. *Acker*, 91.

2. Whether, on a complaint under St. 1906, c. 501, for neglecting to provide for the support of a wife or a minor child, the domicil of the defendant as distinguished from a temporary residence is material, it here was not necessary to consider, because the facts warranted a finding that the defendant had a domicil in the city of this Commonwealth, to the police court of which the complaint was made under § 5 of the statute. *Ibid.*

Employers' liability act gives no remedy to father for expense of medical attendance to minor son made necessary by accident for which employer is liable under the act, see EMPLOYERS' LIABILITY ACT.

PARTITION.

At the trial of a petition for partition of real estate alleged to be held in common by the petitioner and the respondent, it appeared that, after the death of a former owner of the property, an assignment of dower was made to his widow of the lower part of a dwelling house upon the property, and that subsequently, under proper license, the administrator of the estate of the former owner sold and conveyed the property to the respondent's predecessor in title, "saving and reserving that part . . . set off to" the widow. Later the widow died and the heirs of the former owner conveyed to the petitioner's predecessor in title all the "right, title, interest and estate . . . which was set off to" the widow. Before this petition was filed, the house had been removed. The petitioner contended that the land was assigned to the widow as dower, and that, not having been conveyed by the deed of the administrator, it had come to him by deed of the heirs on the termination of the dower estate, while the respondent contended that only an easement in the land had been assigned, and that the land had come to him by the administrator's deed. *Held*, that the petition must be dismissed since, upon either contention, the estate was owned in severalty and not in common. *Herrick* v. *Glidden*, 156.

PARTNERSHIP.

An agreement in writing by one of two partners, upon the dissolution of their partnership to take over the business of the firm and "take up, pay and discharge all the debts and liabilities of the said copartnership as the same shall fall due," includes an obligation to discharge the liability of the members of the partnership upon a judgment obtained in an action brought against them after dissolution for damages caused by alleged false representations made by the firm in the sale of certain securities. *Price* v. *Parker*, 1.

There is nothing invalid or contrary to public policy in such agreement when construed to include such a liability, see CONTRACT, 2.

Knowledge that one partner is insolvent or in contemplation of insolvency is

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not, as matter of law, knowledge that the partnership is insolvent at a time when the other partner is in good financial standing, see INSOLVENCY, 4.

PATENT.

Questions arising in action to recover royalties under contract in writing granting defendant license to sell certain devices, where it was uncertain whether devices as to which controversy arose were covered by patent but it appeared that, for a time, parties agreed by conduct that they were so covered, see CONTRACT, 6; EVIDENCE, 1.

In action of replevin for machines admittedly covered by patents, letters patent which were long, technical and complicated were excluded as likely to mislead jury and it was held that, even if evidence was competent, exclusion was warranted, see EVIDENCE, 10.

PAWNBROKER.

Unlicensed.

1. *It seems*, that one, who has no license to carry on the business of pawnbroking, may have committed one or more acts of receiving articles on pawn and not be guilty under a complaint which alleges that he was carrying on the business of pawnbroking without a license, since it is the occupation and not the act of pawnbroking that is complained of. *Commonwealth* v. *Schwartz*, 107.

2. At the trial of a complaint under R. L. c. 102, §§ 33, 38, charging the defendant with carrying on the business of pawnbroking without a license, it appeared that the defendant had a license to buy and sell second-hand articles but did not have a license to carry on the business of pawnbroking, and a witness testified that, as he was seeking a place to pawn his overcoat, he was passing the store of the defendant and his partner when they accosted him and asked him whether he wanted to buy some clothes; that, on his stating that he did not wish to buy but desired a loan on his overcoat, he was asked to step inside; that he did so, and, after negotiations, the defendant paid him $2.50 and took his overcoat; that, on his asking for a ticket, one of the partners, both being present, stated that they did "not give tickets on overcoats, and that his overcoat would be all right, and that he could get it at any time he called for it by paying $3, which would be fifty cents interest," and that he was repeatedly assured by them that he could have his coat at any time he called for it. There was evidence that the record of the transaction made by the defendant and his partner was of a purchase by them, and that it was so reported to the police department under the terms of their permit. The defendant contended that there was evidence of a single act of pawnbroking only, and not of a carrying on of such a business. *Held*, that there was evidence warranting a finding that the defendant was carrying on the business of pawnbroking without a license. *Ibid.*

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Return to Licensing Board.

3. The record of the transactions of a pawnbroker required by R. L. c. 102, § 42, as amended by St. 1907, c. 211, to be furnished once a week to the licensing board or to any person designated by that board, is not a public record to which all persons may have access and of which they are entitled to be furnished with copies under R. L. c. 35, § 17. *Round* v. *Police Commissioner*, 218.
4. A return made by a pawnbroker to a licensing board under R. L. c. 102, § 42, as amended by St. 1907, c. 211, is not within the definition of a public record in R. L. c. 35, § 5, which includes, among other things, any paper which any officer or employee of the Commonwealth or of a county, city or town has received or is required to "receive for filing." *Ibid.*

PAYMENT.

Where a creditor accepts, as payment of debt, check drawn by debtor and delivered on Sunday and receives payment of the check either from bank or from one to whom he indorses it, the debt is thereupon extinguished, see BILLS AND NOTES, 1.

For illustration of this principle see BILLS AND NOTES, 5.

Where order on trustee was given to holder of promissory note by assignee of beneficiary's interest in trust fund but there was no evidence that trustee accepted order or applied funds which he held to its payment, it was held that there was no evidence of payment of the note, see BILLS AND NOTES, 3.

Payment of claim by insurance company does not prevent company's recovering the money in action of deceit upon showing that settlement was obtained by fraudulent misrepresentations of insured as to particulars of loss, see INSURANCE, 4.

R. L. c. 202, § 13, providing that no indorsement of payment of principal or interest written on note by party to whom payment was made shall be sufficient proof to take case out of statute of limitations is inapplicable to case where there is other evidence sufficient for purpose, see BILLS AND NOTES, 4.

PLEADING, CIVIL.

Declaration.

1. Under a declaration in an action of tort against a town which alleges that a public highway which the defendant was bound to keep in repair so that it would be safe and convenient for travel "was negligently suffered by the defendant to be out of repair, unsafe and inconvenient, whereby the plaintiff, travelling thereon and using due care, was hurt," the plaintiff can recover for an injury received by him by reason of the lack of a barrier to protect travellers on the highway from a condition near it which is such as to expose them to unusual hazard. *Shea* v. *Whitman*, 374.

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2. In a declaration in an action against a surety and the principal on a bond given to prosecute a writ of review of a certain judgment against the principal, an averment that the principal failed to prosecute his writ of review to final judgment sufficiently avers a material breach of the condition of the bond. It is not necessary to describe fully the writ of review and to set out all the proceedings had thereon. Nor is it necessary to declare that any execution had issued or that any demand had been made on the principal, if there are sufficient averments that the principal had not satisfied the final judgment against him. *Jagoe* v. *Robinson*, 416.

3. An objection by a defendant that a declaration in a single count is bad for duplicity, made, not by demurrer, but after he has answered and gone to trial upon the merits, comes too late at the argument in this court upon exceptions taken to rulings upon other matters at the trial. *Paine* v. *Kelley*, 22.

In action of deceit against three persons who separately made like misrepresentations, allegations of conspiracy, if made, are not gist of action and plaintiff can recover against any defendant whose representations were actionable apart from question of joint plan to defraud, see DECEIT, 1, 2.

Questions arising upon demurrer to declaration in action of tort for libel, see LIBEL AND SLANDER 2–5.

Answer.

4. An amended answer of the defendant in an action of contract upon a promissory note, which alleged that the plaintiff "obtained the defendant's signature to the note by deception and fraud, to wit: — by the false and fraudulent representations" of the plaintiff, was filed by consent of the plaintiff on the same day on which the case was tried, and, at the trial, the presiding judge excluded evidence tending to show the truth of its allegations. *Held*, that, there having been no objection to the amended answer until the evidence in support of its allegations was offered, the insufficiency as a matter of pleading of the statement of the defense did not warrant the excluding of competent evidence of its truth. *Low* v. *Low*, 158.

Specifications.

Where plaintiff files specifications setting forth that assault relied upon was committed "on or about" a certain day and at trial introduces evidence tending to show that the assault was committed on that day but jury disagrees and at second trial presiding judge on motion by defendant orders words "or about" to be struck out of specification, he must at least allow plaintiff to amend specification by inserting date which in light of further information he believes to have been true date of assault, see PRACTICE, CIVIL, 4.

Duplicity.

Objection that declaration is bad for duplicity cannot be raised for first time at argument before this court of exceptions relating to other matters, see *ante*, 3.

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Waiver of Defect in Pleadings.

Where amended answer, filed on day of trial by consent of plaintiff, is insufficient as matter of pleading, but no objection is made until competent evidence is offered of its truth, it is error to exclude the evidence, see *ante*, 4.

See also *ante*, 3.

POLICE COMMISSIONER.

By Revised Ordinances of Boston of 1883, c. 24, § 3, board of police commissioners of Boston (and their successor) were given powers formerly held by mayor or aldermen in relation to licensing hawkers and pedlers, carriages, wagons and other vehicles, and thereafter such license granted by aldermen was of no effect, see BOSTON.

Record of transactions of pawnbroker required by R. L. c. 102, § 42; St. 1907, c. 211, to be furnished to licensing authority is not a public record to which provisions of R. L. c. 35, § 17, apply, see PAWNBROKER, 3.

POWER.

Will held to pass estate for life with unlimited power of disposal in fee which life tenant might exercise by her will, see DEVISE AND LEGACY, 1, 9.

For contingent remainders subject to be divested by exercise by life tenant, of power of disposal in fee but which vest upon determination of life estate without such exercise by will or otherwise, see DEVISE AND LEGACY, 1.

But, where power is to be exercised in case it becomes necessary for donee's "interest and comfort," residuary clause in common form is insufficient to execute it, see DEVISE AND LEGACY, 1, 9.

PRACTICE, CIVIL.

Claim against Commonwealth.

1. Under R. L. c. 201, as amended by St. 1905, c. 370, giving the Superior Court "jurisdiction of all claims at law or in equity against the Commonwealth," which provides that such cases "shall be tried by the court without a jury and, if the amount claimed is more than $2,000, by three justices of said court," and that "all hearings shall be in open court," there is no authority to appoint an auditor. *McArthur Brothers Co.* v. *Commonwealth*, 137.

Suggestion as to Jurisdiction by Amicus Curiae.

2. In an action of tort begun by trustee process in the Superior Court, the defendant did not appear, but a member of the bar of this Commonwealth, as a friend of the court, brought before the court a suggestion that the action be dismissed on the ground that the railroad described in the writ as the defendant was the property of the King of the United Kingdom of

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Great Britain and Ireland; and the procedure received this court's approval. *Mason* v. *Intercolonial Railway*, 349.

Quo Warranto.

Remedy by quo warranto will not be allowed where any other relief is available, see QUO WARRANTO.
Illustration of rule, see CORPORATION, 2.

Claimant.

Where legal title to money paid into court is in plaintiff but only as trustee for claimant to whom plaintiff if he received the money must at once pay it over, verdict ordered for claimant will not be set aside, see *post*, 26.

Survival of Suits.

Motion to dismiss action against executor of one who died before action was brought on ground that action did not survive can be made at any stage of the case, see *post*, 8.
Action of tort by husband for consequential damages from injury to wife is not a suit for "damage to the person" which survives under R. L. c. 171, § 1, see HUSBAND AND WIFE, 4.

Parties.

Where negligent acts of two persons operating concurrently contribute to plaintiff's injury he may sue them in one action, see NEGLIGENCE, 46.

Actions tried together.

3. It is within the discretionary power of a judge of the Superior Court to order two actions of tort by the same plaintiff, one against a municipality under Pub. Sts. c. 52, now R. L. c. 51, for injuries alleged to be due to a defect in the highway and the other against a private individual for alleged maintenance of a nuisance, to be tried together where they depend upon the same state of facts. *Jones* v. *Boston*, 66.

Amendment.

Where creditor of insolvent estate of deceased person omits to file statement of claim at time of entering appeal from decision of commissioners reported to Probate Court, judge of Superior Court may allow him to file statement at any time thereafter, see *post*, 22.
Amendment of specifications, see *post*, 4.

Specification of Time.

4. In an action for an assault and battery the plaintiff filed a specification stating that the assault was committed "on or about" a day named. The plaintiff introduced evidence tending to show that the assault was committed on the day named. The jury disagreed, and there was a new trial,

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at which after the plaintiff's opening the defendant moved that the words "or about" should be striken out of the specification filed by the plaintiff, and the judge, subject to the plaintiff's exception, ordered that the words be stricken out. The plaintiff then made motions to amend her specifications in relation to the date in accordance with her understanding of the facts. These motions were denied by the judge. The plaintiff offered evidence to prove her case in all particulars except as to the date named in the specification and said that she could not prove that the assault was committed on that day. Thereupon the judge ordered a verdict for the defendant, and the plaintiff excepted. *Held*, that the order requiring the striking out of the words "or about" from the specifications was erroneous, and, with the denial of the plaintiff's motions to amend her specification, was equivalent to an order forbidding her from presenting the case relied upon and stated in her declaration and in the specification first filed, which, if her case was prosecuted honestly and in good faith, was a denial of justice and was not within the power of the court. *Powers* v. *Bergman*, 89.

Interrogatories.

5. In an action of tort against a corporation, if the president of the defendant has refused to answer certain interrogatories filed by the plaintiff, on the ground that the questions contained in them are not material to the issues in the case, the refusal of the defendant's president to answer the interrogatories, whether justified as matter of law or not, is not for the consideration of the jury, and a ruling allowing the plaintiff to read the questions and the refusals to the jury is erroneous. *Minihan* v. *Boston Elevated Railway*, 367.
6. In an action of tort against a corporation, where the presiding judge, against the defendant's exception, erroneously has allowed the plaintiff to read to the jury refusals of the defendant's president to answer certain interrogatories on the ground that they are immaterial, and the plaintiff in his argument to the jury comments on these refusals as indicating a desire on the part of the defendant not to disclose material evidence which it could disclose, if the defendant in its argument to the jury attempts to justify the refusals, this does not waive its exception to their admission as evidence, it being obliged to argue the case on the evidence which has been admitted. *Ibid.*

Plaintiff who puts in evidence defendant's answers to his interrogatories is not estopped to contradict them, see NEGLIGENCE, 23.

To save valid exception to order to answer interrogatories more fully, bill of exceptions must be filed within twenty days after the ruling in question, see *post*, 29.

Auditor.

Under R. L. c. 201, as amended by St. 1905, c. 370, giving Superior Court jurisdiction of claims against Commonwealth, there is no authority to appoint an auditor, see *ante*, 1.

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Money paid into Court.

Where legal title to money paid into court is in plaintiff but only as trustee for claimant to whom plaintiff, if he received the money, must at once pay it over, verdict ordered for claimant will not be set aside, see *post*, 26.

Election between Counts.

7. In an action of tort by a purchaser of personal property from a trustee in bankruptcy against one who held a chattel mortgage on the property, which he had attempted to foreclose after the adjudication in bankruptcy, there were two counts, the first in the nature of trover and the second in the nature of trespass *quare clausum fregit*. There was evidence that the plaintiff was in possession of the property, and had forbidden the defendant to enter his premises to take the property covered by the mortgage until he came with a writ of replevin, that the defendant came without such a writ, and, in removing a partition which he claimed under the mortgage, injured certain goods, and also took and carried away certain property which was not covered by the mortgage. The defendant excepted to a refusal of the judge to require the plaintiff to elect upon which count he would proceed. *Held*, that, assuming for the purpose of decision that the matter of election was one of right and not within the discretion of the presiding judge, as it probably was, the ruling of the judge was correct, because, if the jury should find that the entry was lawful but that some of the goods taken belonged to the plaintiff, the count in the nature of trover would be necessary, although, if the jury should find that the entry was unlawful, the plaintiff might recover additional damages for the conversion of these goods under the count in the nature of trespass *quare clausum*, under proper instructions not to duplicate damages. *Kennedy* v. *Hoyt*, 361.

Plea in Bar.

If bond is invalid because of unconstitutionality of statute by which it was required to be given, question may be raised in any action upon bond and decision that bond is invalid may be pleaded in bar of any and all other actions upon it, see EQUITY JURISDICTION, 1.

Motion to dismiss.

8. A motion to dismiss an action of tort against an executor, on the ground that the defendant's testator died before the action was brought and that under R. L. c. 171, § 1, the action did not survive, may be made at any stage of the case, because if the allegations are true the court is deprived of all jurisdiction. *Hey* v. *Prime*, 474.

Where record shows that no judgment has been entered it cannot be controlled by showing, on motion to dismiss, that plaintiff, at earlier stage of case, filed motion that "judgment this day entered be vacated," see JUDGMENT, 4.

Suggestion by *amicus curiae* that action should be dismissed for want of jurisdiction, see *ante*, 2.

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Exceptions to Interlocutory Order or Ruling.

Bill of exceptions to interlocutory order must be filed within twenty days after order is made although it need not be entered in this court until case is ripe for judgment in Superior Court, see *post*, 29.

Different Positions at Successive Trials.

9. At the second trial of an action for an assault the plaintiff is not estopped by the fact, that her evidence at the first trial tended to show that the assault was committed on a certain day, from showing at the second trial, under a proper specification of time, that the witnesses at the first trial were mistaken in that part of their testimony and that the assault was committed on a different day. *Powers* v. *Bergman*, 39.

Trial of Issues framed for Jury.

10. Where in the trial of issues framed for a jury in proving a will, there has been error in the exclusion of evidence which should have been admitted in the trial of the issue of undue influence, but the other issues have been tried without error, a new trial will be granted upon the issue of undue influence only, and the verdict of the jury on the other issues will stand. *Gorham* v. *Moor*, 522.

Offer of Proof.

11. In an action against a navigation company for the alleged breach of an express contract to hire the plaintiff for one year as a steamboat captain at a salary of $1,500 a year, where the defendant did not deny the hiring of the plaintiff but alleged that he was hired for an indefinite period and was discharged in accordance with the terms of the contract, the defendant asked a witness, "Do you know what the custom is in [the port where the contract was made] with regard to hiring captains and officers of steamboats?" The presiding judge excluded this question and the defendant excepted. The defendant then asked the witness "Do you know whether there is a custom which would be known generally to people employing officers of steamship companies?" This was excluded but the defendant did not except. The defendant's counsel said, "I offer this in evidence, first, as being the custom, showing the intention of the parties at the time this contract was made, and also as being corroborative of [the defendant's general manager's] statement that there was no contract." *Held*, that as the first question was accompanied by no offer of proof the exception to its exclusion must be overruled, and to the second question, respecting which an offer was made, no exception was taken, so that no question of law was before this court, but *it was said* that, even if the rights of the defendant had been saved fully, the offer of proof as to a custom was too general and indefinite to be of any aid in dealing with the issues on trial. *Cook* v. *Enterprise Transportation Co.* 7.

Where judge rules that no evidence of what witness now dead testified to at former trial of same case can be admitted it is not necessary to offer to

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show that witness by whom it is proposed to show what the testimony was could repeat it with necessary accuracy in order to save valid exception, see EVIDENCE, 6.
Exception to exclusion of question will be overruled unless statement of substance of answer expected was made to judge and shows that exclusion prejudiced excepting party, see *post*, 24.
Illustration of this principle, see *post*, 25.

Requests for Rulings.

At hearing upon motion for new trial, see *post*, 16.

Rulings by Trial Judge.

12. It is proper for a judge before whom a case is tried without a jury to refuse requests for rulings of law based on testimony which he is not bound to believe, especially if he does not believe it. *Schlatter* v. *Young*, 36.

Discretion of Presiding Judge.

To order actions to be tried together, see *ante*, 3.
To refuse to order plaintiff in certain case to elect between a count in nature of trespass and one in nature of trover, see *ante*, 7.
To determine scope and extent of cross-examination, see WITNESS, 2, 3.
To exclude evidence which will be more likely to mislead than to aid jury, see EVIDENCE, 10.
To pass upon motion for new trial where judge of same court before whom case was tried died after motion was filed but before he could hear it, see *post*, 18.
Refusal of judge hearing motion for new trial to consider certain affidavit "as matter of law and not of discretion" held error, see *post*, 19.
To determine weight of affidavit as to newly discovered evidence offered as ground for motion for new trial, see *post*, 19.

Conduct of Trial.

Admission and exclusion of evidence.
It is proper to exclude evidence which is more likely to mislead than to aid jury, see EVIDENCE, 10.
It is error to exclude competent evidence offered in support of defective pleading where no objection is made to the insufficiency of the pleading until the evidence is offered, see PLEADING, CIVIL, 4.
Where refusal to answer interrogatories is based upon assertion of alleged legal right it is error to allow counsel to read to jury interrogatories and refusal to answer them, see *ante*, 5.
Exception to such erroneous ruling is not waived by attempt in argument to justify refusals, see *ante*, 6.
Where judge rules that no evidence of what witness now dead testified to at former trial of same case can be admitted, it is unnecessary to offer to show that person by whom it is proposed to show what testimony was

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could repeat it with necessary accuracy in order to save a valid exception, see EVIDENCE, 6.

Examination of witness.

Exercise of discretion in determining scope and extent of cross-examination, see WITNESS, 2, 3.

Charge to jury.

13. In a civil case the presiding judge in explaining the term "burden of proof" told the jury that they could not find in accordance with a particular contention unless it was "proved that it was so," and added "by proved that it was so I mean a balance of proof in favor of the theory. . . . The plaintiff must make his side heavier, stronger in favor of the proposition to your minds, than that of the defendant, because if your minds remain balanced you will have to give a verdict for the defendant." In another place he said "such damages as are proved by a fair preponderance of the evidence she is entitled to recover for, and those which she has not so proved she is not entitled to recover for." *Held*, that from these instructions the jury must have understood the law upon the subject correctly, although the judge made further explanations which were not so clear. *Soebel* v. *Boston Elevated Railway*, 46.

14. It is not a violation of the requirement of R. L. c. 173, § 80, that "the courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law," for a judge in his charge to elucidate the proper application of the legal principles involved in the case before him by illustrations drawn from common experience or by reference to cases where similar questions have been decided, or to define the degree of weight which the law attaches to a whole class of testimony; and if, by an unbiased analytical statement of the testimony and of the law, he distinctly indicates to the jury the party who is entitled to prevail, and a verdict is rendered for such party, the defeated party has no just reason to complain, especially if, a question being raised as to whether or not the charge was argumentative, the judge in full and unexceptionable language instructs the jury that what he had said by way of comment was only to make plain the issues, which were solely for their determination. *Whitney* v. *Wellesley & Boston Street Railway*, 495.

15. In his charge to the jury in an action of tort in the nature of trespass *quare clausum fregit*, in which the plaintiff contended that the defendant, an owner of adjoining land, had built about twelve inches over the line upon the plaintiff's land, and in which the great preponderance of the evidence was in the plaintiff's favor, the presiding judge, after commenting unfavorably upon actions of such a nature, stated "I suggested to counsel yesterday, in the interest of public trials in the courts, and in the interests of the parties, that perhaps they would agree that, if the defendant were over the line, and the jury so found, you should assess all the damages by him for the value of the land and all the plaintiff has to suffer in consequence of it now and for all time, and have it once for all settled. The defendant's counsel said he was willing to do that, and the plaintiff's

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counsel said no, and he had a right to say no, because his client would not agree to it; and whether he was stubborn or not is none of our business; he had the constitutional right to do just what he was doing, and it is our duty, whether we think it is proper or not, to give him a fair and impartial trial"; and, at the end of the charge, stated "Whether this is a suit, as it is said, for spite, or whether it is an unwise suit or not, you must take it and decide it. The plaintiff has a right to be here; he has a right to claim his inch of land if he has it, and the defendant has a right to come here and defend; and it is your duty to sit down, and decide this question as best you can between them, and do justice in the case." At the conclusion of the charge, the plaintiff called the attention of the judge to the foregoing passages, but he refused to change the charge, stating that what he had already said as to the plaintiff's standing upon his rights ought not to affect them, "because he had a right to do just as he did." *Held*, that the presiding judge erred in incorporating into his charge facts which were not in evidence and did not affect the merits of the case, and which, if they had been offered in evidence, should have been excluded, and were likely to and probably did distract the attention of the jury from the consideration of the true merits of the issue. *Allen* v. *Kidd*, 256.

Where charge removes certain issues from consideration of jury, it is proper for judge to refuse rulings which relate to those issues, see *post*, 28.

Exceptions to refusal to give ruling in language requested will be overruled where instructions given upon subject were full, correct and appropriate, see *post*, 23.

Ordering Verdict.

Where defendant, in action of replevin, introduces no evidence but evidence introduced by plaintiff warrants verdict only if jury draws certain inferences, it is proper to refuse to order verdict for the plaintiff, see REPLEVIN, 2.

Where plaintiff legally was entitled to money paid into court but only as trustee for claimant to whom he must have paid it over immediately upon receiving it, verdict ordered for claimant will not be set aside, see *post*, 26.

Findings of Trial Judge.

Judge hearing of petition for disbarment which alleges that fee charged for services was excessive is not bound to accept testimony of experts called by respondent that fee under the circumstances was not unreasonable, see ATTORNEY AT LAW, 1.

Verdict.

Where legal title to money paid into court is in plaintiff but only as trustee for claimant to whom plaintiff if he received the money must at once pay it over, verdict ordered for claimant will not be set aside, see *post*, 26.

New Trial.

16. The provision of Common Law Rule 45 that "Requests for instructions or for rulings in trials with or without jury shall be made in writing before the closing arguments unless special leave is given to present further re-

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quests later," is not applicable to requests for rulings made at a hearing upon a motion for a new trial. *McDonnell, petitioner*, 252.

17. At the hearing upon a motion of the plaintiff in an action at law for a new trial after a verdict for the defendant, the grounds stated in the motion being, first, that the verdict was against the evidence and the weight of evidence and, second, that it was against the law and the rulings of the presiding judge, the defendant asked the presiding judge to rule "that the Superior Court has no power to grant a new trial upon other grounds, after the expiration of the time for filing the same, than those specifically stated in the motion for a new trial." No question as to the pleadings had been raised at the trial. The judge refused to grant the request and ordered a new trial, but the ground upon which he ordered it did not appear, although it appeared from the record that during the hearing he questioned counsel as to the propriety of the verdict on the pleadings as they stood. *Held*, that the presiding judge erred in not giving the ruling requested by the defendant. *Ibid.*

18. If the judge who presided at a trial dies after a motion for a new trial has been filed but before it has been passed upon by him, the motion for a new trial is not to be granted as a matter of right by reason of the death of the judge before whom the case was tried, but, on the contrary, another judge of the same court at a hearing on the motion has the same discretionary power to grant or deny it that the deceased judge had. *Benson* v. *Hall*, 517.

19. On an application for a new trial on the ground of newly discovered evidence, affidavits under Rule 31 of the Superior Court of 1900 setting forth what a person other than the affiants has said showing his knowledge of important facts which were not known to the applicant at the time of the trial, should not be rejected because based on hearsay, if the affidavit of the witness who knows the facts cannot be obtained, and should be received and considered by the trial judge to whom the application is made, it being for him to say how much weight should be given to them. *Soebel* v. *Boston Elevated Railway*, 46.

Where in trial of issues framed for jury in proving a will, there has been error in trial of issue of undue influence, but other issues have been tried without error, new trial will be granted upon issue of undue influence only, see *ante*, 10.

Death of Judge.

Where judge who presided at trial dies after motion for new trial has been filed but before hearing it, another judge of same court may hear motion and exercise same discretionary power to grant or deny it that deceased judge had, see *ante*, 18.

Record.

Upon a motion to dismiss an action on ground that it had been disposed of by final judgment in lower court, fact that plaintiff, at previous stage of case, had filed motion "that the judgment this day entered be vacated," cannot control record which shows that no judgment had been entered, see JUDGMENT, 4.

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Exceptions to interlocutory order held upon the record not properly to be before this court, see *post*, 29.

Appeal.

20. Since terms of court were abolished by St. 1885, c. 384, the first Monday in every month is the day for the entry of appeals in the Superior Court and the Supreme Judicial Court. *Reardon* v. *Cummings*, 128.

21. The provision of R. L. c. 142, § 12, that an appeal to the Superior Court or the Supreme Judicial Court by a creditor of an insolvent estate of a deceased person from a decision of commissioners reported to the Probate Court disallowing a claim in whole or in part shall be entered on the first Monday of the calendar month next succeeding the expiration of thirty days after the return of the commissioners, is complied with by an entry of the appeal, after giving the required notice, before the day designated by the statute, such premature entry when otherwise complete being treated as taking effect on the designated day. *Ibid.*

22. When an appeal to the Superior Court by a creditor of an insolvent estate of a deceased person from a decision of commissioners reported to the Probate Court has been entered on the day designated by the statute after giving the required notice, if upon the entry of his appeal the creditor failed to file a statement in writing of his claim as required by R. L. c. 142, § 13, a judge of the Superior Court may permit him to file the statement at any time afterwards. *Ibid.*

Exceptions.

Where error, if any, was not prejudicial.

23. An exception to a refusal by the judge presiding at a trial to give a ruling in the language requested will not be sustained where the instructions given on the subject to which the request related were full, correct and appropriate. *Gurney* v. *Tenney*, 457.

24. An exception to the exclusion of a question to a witness cannot be sustained unless the bill of exceptions shows that the substance of the evidence which was expected in reply was stated to the presiding judge and unless upon such statement it appears that the excepting party was harmed by the exclusion. *Cook* v. *Enterprise Transportation Co.* 7.

25. In an action against a navigation company for the alleged breach of an express contract to hire the plaintiff for one year as a steamboat captain at a salary of $1,500 a year, where the defendant did not deny the hiring of the plaintiff but alleged that he was hired for an indefinite period and was discharged in accordance with the terms of the contract, the defendant, having called its general manager as a witness, asked him, "What is the custom in steamship circles with regard to hiring of men?" The judge excluded the question, whereupon the defendant's counsel said, "It seems to me, where the contract is very ambiguous as to time, that any evidence of a custom in hiring for a certain time is relevant." The judge still excluded the question. *Held*, that, even if the statement of the defendant's counsel amounted to an offer of proof, the exclusion of the evidence did not appear to have injured the defendant, as the statement

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apparently referred to a custom of hiring for a certain time and not for an indefinite period, which would tend to support the plaintiff's view of the contract rather than that of the defendant, so that the exclusion of the evidence could not have harmed the defendant. *Cook* v. *Enterprise Transportation Co.* 7.

26. In an action, by the trustee under a deed made by a woman of advanced age and physically weak conveying all her property to the plaintiff in trust for the benefit of the grantor during her life, against a person previously appointed by the grantor as her agent, to recover rents collected by him from the real estate of such grantor and not paid over, where the defendant has paid into court the money collected by him and has caused the beneficiary to be made a party as claimant, and the presiding judge has ordered a verdict for the claimant, such verdict will not be set aside upon a decision by this court that the plaintiff is entitled to the money, as all that the plaintiff could do with the money, if paid to him, would be to pass it over to the claimant, an idle ceremony which the law does not require. *Lima* v. *Cook*, 11.

Exception to ruling upon admission of evidence overruled where, assuming that ruling was erroneous, excepting party was not harmed, see EVIDENCE, 8, 10.

Election.

Upon exception to refusal to order election between count in nature of trover and one in nature of trespass, it was said that matter was probably one of discretion but that in any case refusal was right, see *ante*, 7.

Admission or exclusion of evidence.

27. Where a plaintiff excepted to the admission of evidence at a trial, and, in his ruling admitting it, the presiding judge stated that it was a part of the history of the transaction between the parties and might be dealt with later in the trial by striking it out or by giving instructions with regard to it, and later in the trial a witness for the plaintiff in direct examination gave evidence of the same kind and was cross-examined fully upon the subject, and no motion was made by the plaintiff to strike out the evidence or for instructions regarding it, the exception was overruled. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

Where refusal to answer interrogatories is based upon assertion of alleged legal right, it is error to permit counsel to read to jury interrogatories and refusals to answer, see *ante*, 5.

And exception to such erroneous ruling is not waived by excepting party's attempt in argument to justify refusals, see *ante*, 6.

Evidence held properly excluded as more likely to mislead than to aid jury, see EVIDENCE, 10.

Cases where, if ruling was erroneous, excepting party was not harmed and exception was overruled, see EVIDENCE, 8, 10.

Offer of proof.

Where judge rules out all evidence of testimony at former trial of witness now dead, it is unnecessary in order to save valid exception to offer to

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show that person by whom it is proposed to prove what the testimony was can repeat it with required accuracy, see EVIDENCE, 6.

For offer of proof as to a custom which is held too general and indefinite to be of aid in dealing with issues and, therefore, not to be sufficient basis for sustaining an exception, see *ante*, 11.

See also *ante*, 24.

Rulings inapplicable to case as given to jury.

28. Rulings requested at the trial of a case which were inapplicable because the charge to the jury removed from their consideration the subject to which the rulings referred were *held* rightly to have been refused. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

Ordering verdict.

Where defendant, in action of replevin, introduces no evidence but evidence introduced by plaintiff warrants verdict only if jury draws certain inferences, it is proper to refuse to order verdict for the plaintiff, see REPLEVIN, 2.

See also *ante*, 26.

Charge.

Where judge incorporated facts into charge which were not in evidence and could not properly have been admitted in evidence and which probably distracted attention of jury from true issues of case, exception to charge will be sustained, see *ante*, 15.

Charge, to which exception was taken as argumentative and as violating R. L. c. 173, § 80, forbidding court to charge jury with respect to facts, held unobjectionable, see *ante*, 14, 15.

Exceptions not properly before court upon record.

29. After a hearing before a judge of the Superior Court on a motion of a plaintiff in an action of contract to compel the defendant to answer more fully interrogatories propounded to him by the plaintiff, the judge granted the motion and the defendant excepted, but filed no bill setting forth his exception. Like exceptions were taken to subsequent rulings by different judges on similar motions of the plaintiff with regard to further answers which the defendant had filed to the interrogatories, but no bills were filed setting them forth. Subsequently there was a trial of the case before the judge who made the first ruling with regard to the answers to the interrogatories, exceptions were taken by the defendant to rulings in favor of the plaintiff made at the trial, and a bill setting forth such exceptions was filed more than twenty days after the last ruling as to answers to the interrogatories, and was allowed. This bill of exceptions also contained a full statement of all the rulings by the various judges as to the answers to interrogatories. *Held*, that upon the record no exception with regard to the interrogatories was before this court. *Brooks* v. *Shaw*, 376.

Rules of Court.

Common Law Rule 45 of Superior Court as to presentation in writing of requests for rulings or instructions before closing arguments is not applicable to requests made at hearing upon motion for new trial, see *ante*, 16.

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Rule 31 of Superior Court of 1900 relating to verification of motion for new trial, see *ante*, 19.

PRESCRIPTION.

Fact, that if one who unlawfully obstructs watercourse should acquire by prescription right so to obstruct it this would injuriously affect land of riparian owner, is sufficient to entitle such owner to maintain action of tort against obstructor although he has sustained no actual present damage, see WATERCOURSE, 1.

PROXIMATE CAUSE.

See NEGLIGENCE, 18, 24, 43.

PUBLIC RECORD.

Record of transactions of pawnbroker required to be furnished to licensing board under R. L. c. 102, § 42, as amended by St. 1907, c. 211, is not a public record to which all may have access and of which they are entitled to be furnished with copies under R. L. c. 35, § 17, see PAWNBROKER, 3.

A document within definition of "public record" contained in R. L. c. 35, § 5, is not thereby made a public document, see EVIDENCE, 7.

PUBLIC SERVICE CORPORATION.

1. A public service corporation cannot sell its property and franchises to another corporation in such a way as to part with the power to perform its public duties. *Weld* v. *Gas & Electric Light Commissioners*, 556.
2. In regard to gas and electric lighting companies this Commonwealth has adopted legislative regulation and control rather than the encouragement of competition for protection against the evil effects of a monopoly. *Ibid.*
3. An electric light or gas company, which has a franchise covering a city or town in which another company has a like franchise, if the public interest is not affected injuriously thereby, lawfully can arrange with the other company to extend its lines into one part of new territory that is being developed and to leave the other company to extend its lines into another part of such territory, so that neither company will duplicate lines in streets where the other is serving the public, this being a detail of administration which is not an illegal parting with a portion of its franchise; and such an arrangement may be upheld although certain streets in which both companies previously have run lines are included in the arrangement. *Ibid.*

PUTNAM FREE SCHOOL.

Case concerning salary of principal for year 1898–1899, see CONTRACT, 5.

QUO WARRANTO.

A remedy by quo warranto will not be given where any other adequate relief is available. *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 194.

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Before passage of St. 1906, c. 372, Attorney General by quo warranto proceedings or by information in equity in nature of quo warranto might have obtained decree ousting domestic corporation from exercise of unauthorized franchises although case was not so serious as to warrant forfeiture of corporate charter, see CORPORATION, 1.

Since the passage of that statute, remedy given by it is exclusive, see CORPORATION, 2.

RAILROAD.

Where railroad corporation is guilty of violation of law Attorney General is not compelled by St. 1906, c. 463, Part I. § 8, to await action of railroad commissioners before instituting such proceedings as situation may demand, see ATTORNEY GENERAL.

Action against railroad and street railway corporations jointly where negligence of each operated concurrently to cause plaintiff's injury, see NEGLIGENCE, 46.

Injury to passenger leaving station by other than way of exit provided, see CARRIER; NEGLIGENCE, 35.

Who is passenger, see CARRIER.

Injury to invited person, see NEGLIGENCE, 32–34, 37.

Injury to licensee, see NEGLIGENCE, 35.

Injury to traveller on highway, see NEGLIGENCE, 36–39, 46.

Violation of rules as evidence of negligence, see EVIDENCE, 13.

RAILROAD COMMISSIONERS.

St. 1906, c. 463, Part I. § 8, providing that if railroad or street railway corporation, in the opinion of the board of railroad commissioners, has violated law and continues so to do after notice by them, they shall present the facts to the Attorney General for his action, does not limit authority of Attorney General independently to institute proceedings where public interest demands, see ATTORNEY GENERAL.

As to powers of mayor of Cambridge and of this board relative to stations in subway to be constructed under St. 1906, c. 520, see BOSTON ELEVATED RAILWAY.

REAL ESTATE.

Holder of instrument in writing giving option to purchase real estate has no interest in the real estate until he elects to purchase under option and gives notice of election, see CONTRACT, 3.

Advertising that he will sell property at auction on date three days before option expires is not notice by holder of election to purchase under option, see CONTRACT, 4.

RECEIVER.

Action by one appointed receiver of Minnesota corporation by Minnesota court brought in Massachusetts to collect assessment levied by that court upon shares held by resident of this Commonwealth, see JUDGMENT, 1–3; CONSTITUTIONAL LAW, 2.

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Questions arising upon application by insurance commissioner, under R. L. c. 118, § 7, for appointment of receiver to take possession of assets of domestic insurance company and to settle its affairs, see INSURANCE, 1, 2.

REFERENCE.

Award by two of three arbitrators is not binding in absence of provision in agreement of reference to that effect, see ARBITRAMENT AND AWARD.

REGISTRATION OF DEEDS.

Lease of land for five years containing covenant to renew for further term of five years is a lease for more than seven years within R. L. c. 127, § 4, see LANDLORD AND TENANT, 3.

If recorded under that section it gives lessee, upon his election to take renewal, rights of lessee for ten years, see LANDLORD AND TENANT, 3.

If not recorded grantee in deed made expressly subject to lease is bound by covenant irrespective of notice as it runs with the land, see COVENANT, 3, 4.

Holder of unrecorded mortgage upon land or beneficiary of unrecorded trust concerning land cannot hold against trustee in bankruptcy of owner of legal title, see BANKRUPTCY, 2, 3.

RELEASE.

1. A release in writing of a cause of action is not invalidated, in the absence of fraud on the part of the person procuring it, merely by the facts that the party signing it did not read it and did not understand its contents. *McNamara* v. *Boston Elevated Railway*, 383.
2. A mere concealment of the contents of a release of a cause of action on the part of the person benefiting by the terms of the release, even if there be an attempt to defraud, is not in itself enough to avoid the release. The true rule is that, where the person to whom the release is given undertakes to state its contents and conceals a material part of them, a fraudulent misrepresentation which invalidates the release is made out. *Ibid.*
3. At the trial of an action of tort against a street railway company to recover for personal injuries alleged to have been received by the plaintiff, a woman, while a passenger upon a car of the defendant, the defendant relied in defense upon a release under seal. The plaintiff admitted that she signed the release but contended that when she did so she did not have legal competency to act, and that she was induced to sign by fraud on the part of the defendant's agent. There was evidence tending to show that, after the accident, the plaintiff was "in a very weak, hurt condition," that she travelled to within a short distance of her home by other street cars, making two transfers on the journey, and walked the remainder of the distance unattended, that then she went upstairs and lay down for a time when, in answer to a summons by the door bell, she

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Release (*continued*).

came downstairs, "almost collapsed because of the effort," rested a moment and then opened the door, and admitted the agent of the defendant. Her account of her interview with the agent was intelligent and, among other things, it appeared that the interview lasted from four o'clock to fifteen minutes after four, that the agent either told her that he had been to the houses of other passengers and "all the ladies had signed," or that he had been to all the houses "and they signed," that the agent urged her to sign and that she, at first saying that she could not tell whether she was going to "sue the road" or not until she had seen her doctor, and protesting that she physically was unable to sign, finally did sign the release, and that, thereafter, in response to a question by him, she told the agent that the physician whom she was going to see was her family physician, that the agent thereupon handed her $5 and, she asking "What is this for?", he stated "That will pay the doctor." There was further testimony that, after the agent left, the plaintiff was "in a very weak condition," and, within an hour "was hysterical" in conversation with her husband and "unable to give a clear story of the accident," but that, within another hour she told the story of the accident to her physician. The plaintiff testified that she could not remember whether the agent read the release over to her or explained it to her. There was no evidence that the agent's statement as to the other passengers having "signed the paper" was false. *Held*, that there was no evidence from which a jury would be warranted in finding either that the signature of the plaintiff to the release was procured by fraud or that, when she signed, she did not have legal competency to act; and that therefore the release was a bar to the action. *McNamara* v. *Boston Elevated Railway*, 383.

Evidence of certain alleged oral agreement held inadmissible to contradict terms of release in writing stated to be "for the sole consideration" named, no fraud being alleged, see EVIDENCE, 4.

Accord and satisfaction, see SEAMAN, 4, 5.

REPLEVIN.

1. At the trial of an action of replevin, the plaintiff introduced evidence from which the jury might draw inferences which would warrant a verdict for the plaintiff. The defendant introduced no evidence. The presiding judge instructed the jury: "The possession of the property by the defendant and exercising rights of ownership over it is evidence of ownership to consider." *Held*, that the instruction was correct. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.
2. Where, at the trial of an action of replevin, the plaintiff introduces evidence from which the jury might draw inferences which would warrant them in finding for the plaintiff, but which, without such inferences, would not warrant a finding for the plaintiff, and the defendant introduces no evidence, the presiding judge rightly may refuse to rule that, as a matter of law, the plaintiff is entitled to the property replevied. *Ibid.*
3. At the trial of an action of replevin for certain machines, it appeared

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that the plaintiff formerly had owned the machines and had leased them to one for use in his factory, and that the factory had burned and the machines been damaged. There was evidence tending to show that one having authority to act for the plaintiff had told the lessee that, if a certain person should say that the machines were worthless, the lessee might sell them as junk, that the person designated did say that the machines were worthless, and that the lessee sold them as junk to one from whom the defendant purchased them in good faith. *Held*, that there was evidence to warrant a submission of the case to the jury and to warrant them in finding for the defendant. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

One who stands by without disclosing his ownership and allows his property to be sold to an innocent purchaser for value cannot thereafter claim it, see SALE.

RES IPSA LOQUITUR.

See NEGLIGENCE, 22, 23.

RES JUDICATA.

In an action for a breach of a covenant of warranty in a deed of real estate, consisting of the plaintiff's alleged eviction from the use of an alleyway adjoining the premises in which the plaintiff was granted a right of way by the deed, the plaintiff, to show an eviction, put in evidence the record of a judgment against him in an action for trespass brought by a third person because of his use of the alleyway. The declaration in the action for trespass consisted of two counts containing general allegations of title, with further averments of distinct trespasses, some of which related only to a use which might have been found to be in excess of the plaintiff's grant, while others rested upon a denial of his right to use the way for any purpose. All the allegations were put in issue by the answer, and there was a general judgment upon the merits for the third person who was the plaintiff in the action for trespass. The extent of the plaintiff's right of way in the alleyway was not defined in his deed. Extrinsic evidence was admitted from which it could have been found that the judgment in the action for trespass rested upon the sole ground that the third person who brought that action had a better title than the plaintiff. There was evidence that the defendant was informed of the action for trespass and was requested by the plaintiff to defend it. The presiding judge ruled that if the defendant was offered in a proper way the defense of the action for trespass the judgment was conclusive against him. *Held*, that this ruling was wrong; that after the evidence was presented it remained a question of fact for the jury to decide upon all the testimony, under suitable instructions, what issues actually had been tried and determined in the action for trespass in which the judgment was obtained, and that it was erroneous to say that as matter of law the defendant was estopped by the judgment to deny the eviction. *Richstein* v. *Welch*, 224.

Where court of last resort of incorporating State has sustained validity of

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assessment levied under a statute, which has been declared constitutional by the Supreme Court of the United States, upon shareholders of corporation, questions will not be reinvestigated in action brought in this Commonwealth to recover amount of such assessment from Massachusetts shareholder, see JUDGMENT, 1–3; CONSTITUTIONAL LAW, 2.

RIPARIAN RIGHTS.

Ditch which was artificially constructed may acquire legal character of natural watercourse, see WATERCOURSE, 3.

Riparian owner whose land is overflowed by reason of obstruction of such a ditch which otherwise was outlet for surplus water in time of flood has remedy by action of tort against him who is responsible for obstruction, see WATERCOURSE, 3.

To maintain such action he need not show that his land suffers damage differing from that to other riparian proprietors in like position on the river, see WATERCOURSE, 2.

Or any actual damage other than that, if obstructor should by lapse of time acquire right to maintain obstruction, an injurious effect would be produced upon his property, see WATERCOURSE, 1.

RULES OF COURT.

Common Law Rule 45 of Superior Court, see PRACTICE, CIVIL, 16.

Superior Court Rule 31 (of 1900), see PRACTICE, CIVIL, 19.

SALE.

If one stands by and, without disclosing his ownership, allows his property to be sold to an innocent purchaser for value, he is estopped from claiming it afterwards. *United Shoe Machinery Co.* v. *Bresnahan Shoe Machinery Co.* 206.

Upon certain evidence, finding that owner of certain property could not reclaim it from one to whom it had been sold in good faith by lessee in reliance upon permission given by owner so to sell it if a designated person said it was worthless was held to have been warranted, see REPLEVIN, 3.

For representations of facts concerning value of certain stock which are held to be actionable as more than mere seller's talk, see DECEIT, 3.

Holder of option in writing for purchase of real estate acquires no interest in real estate until he elects to purchase and gives notice of election, see CONTRACT, 4.

One who agrees to buy real estate is, in the absence of specific provision, not excused from performance by fact that title of seller is incumbered at a time previous to that set for performance, see CONTRACT, 10.

One remaining in possession after giving at expiration of lease notice of intention to purchase under provision in lease at price to be fixed by arbitration held to be in possession under contract of sale and not to be liable for rent or to be ejected by summary process, see LANDLORD AND TENANT, 8.

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Right to specific performance of such contract may be lost by failure to endeavor to have sale consummated within reasonable time, see EQUITY JURISDICTION, 2.
Illegality of sale of land for non-payment of taxes for insufficiency of notice, see TAX, 9.

SAVINGS BANK.

Whether bank book locked in trunk in shop can be delivered as gift by delivery with that intent of four keys on a ring of which one is key of shop and another is key of trunk, *quaere*, see GIFT, 1.
But where such handing over of keys is not made as a delivery of book but merely for purpose of getting out book and giving it to owner there is not a completed gift, see GIFT, 2.

SEAMAN.

1. One who has shipped as "mess boy" on a vessel for a voyage from port to port and return, under shipping articles by which his wages are not payable until the expiration of his term of service, if he is discharged by the master unjustifiably before the voyage is ended, may recover the damages suffered from his wrongful discharge. *Boston* v. *Ocean Steamship Co. of Savannah*, 561.
2. A seaman who has shipped for a voyage from port to port and return, who is discharged by the master unjustifiably at the outward port, can recover from the owner of the vessel as damages for his wrongful discharge, not only compensation for his loss of time, but also his necessary expenses incurred in returning to the port of shipment. *Ibid.*
3. In an action by a seaman for his alleged unlawful discharge before the termination of the voyage for which he shipped, where the defendant contends that the plaintiff was discharged rightfully for being absent from the ship without permission, if it appears that the plaintiff was given leave to go ashore for medical treatment and that the plaintiff while on shore made a complaint to a commissioner for an alleged assault upon him by the ship's fireman, and the evidence is conflicting as to whether the plaintiff had permission to go ashore to consult the commissioner as well as to go for medical treatment, it is a question for the jury, in case they find that the plaintiff's shore leave was limited to going for medical treatment, to determine whether under the circumstances the plaintiff had been guilty of such misconduct as to justify the defendant in terminating the contract. *Ibid.*
4. The consent by a seaman to his discharge before the termination of the voyage for which he has shipped, which he gives on the condition that he shall receive a full month's wages, is not binding upon him if he is offered by the master wages for only five days. *Ibid.*
5. In an action by a seaman against the owner of a vessel for damages for the plaintiff's unlawful discharge by the master before the termination of the voyage, in which the plaintiff claims a full month's pay and the

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necessary expenses of his return to the port of shipment as damages incurred by reason of his unlawful discharge, if it appears that the plaintiff, who was illiterate, was given by the master in the port where he was discharged an order on the owner for the amount of his wages for five days, that being the time during which the plaintiff had served before his discharge, but that the plaintiff never collected or negotiated this order and tendered it at the trial to the defendant, who refused it, the order does not constitute an accord and satisfaction unless it was accepted as such by the plaintiff, and if the evidence on this point is conflicting, it is a question for the jury whether the plaintiff, being without money and away from home, after having been denied recognition as a member of the ship's company, agreed to receive five days' wages in full satisfaction of his claim. *Boston* v. *Ocean Steamship Co. of Savannah*, 561.

SCIRE FACIAS.

Scire facias under R. L. c. 169, §§ 7, 8, is proper remedy for breach of bail bond given by woman arrested on mesne process in action of tort, although there also is a remedy by action of contract under R. L. c. 168, §§ 66, see BOND, 2.

SLANDER.

See LIBEL AND SLANDER.

SNOW AND ICE.

See WAY, 12; NEGLIGENCE, 27.

STATUTE.

Constitutionality.

St. 1902, c. 406, providing that "actions of tort for injuries to the person against counties, cities and towns, shall be commenced within two years next after the cause of action accrues," is constitutional although it is construed to apply to causes of action which already had accrued when it was passed, see LIMITATIONS, STATUTE OF, 2.

Provisions of St. 1906, c. 393, §§ 5–9, relating to betterment assessments in Boston, are constitutional, see TAX, 7.

R. L. c. 144, §§ 10, 11, are constitutional, see CONSTITUTIONAL LAW, 3.

St. 1905, c. 308, is constitutional, see CONSTITUTIONAL LAW, 4.

Retroactive Effect.

See *post*, 1.

Construction.

1. It is a general rule in the construction of statutes that they are intended to operate prospectively and not retroactively, and therefore that in the absence of an express provision to that effect they do not relate back so as

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to affect existing rights of property, but, in the prospective operation of a statute dealing only with remedies and the enforcement of rights, the future procedure under the new legislation is as applicable to previously existing substantive rights as to those afterwards acquired. *Mulvey* v. *Boston*, 178.

2. Statutes of limitation, where they contain no language clearly limiting their application to causes of action arising in the future, are construed to apply as well to causes of action which already have accrued as to those which may accrue afterwards, if sufficient time has been allowed between the passing of the act and the time fixed for the new limitation to take effect to afford full opportunity for all persons having such causes of action to bring their suits. *Ibid.*

Construction of Particular Statutes.

R. L. c. 6, § 77, applies to contract made by Massachusetts School for the Feeble-Minded under statutory authority for erection of building upon land owned by Commonwealth, see COMMONWEALTH, 3.

Where non-resident testator leaves real estate in this Commonwealth subject to mortgage, tax can be assessed under R. L. c. 15, § 1, upon value of equity of redemption only, see TAX, 3.

R. L. c. 35, § 5, which states what words "public records" shall mean in construing provisions of that chapter does not make documents therein described public documents, see EVIDENCE, 7.

Where order for laying out street is silent as to damages, that is an adjudication that no one is entitled to damages and is an "estimate of damages" within R. L. c. 50, § 4, see DAMAGES, 1.

St. 1906, c. 393, § 9, permits assessment of benefits to estates abutting on street in Boston laid out under order passed in 1897 and finished in 1905, see TAX, 6.

Under R. L. c. 51, § 1, cities and towns are required to keep ways reasonably safe for travel generally but test is whether way is safe for "carriages" drawn by animal power and special provisions need not be made for automobiles, see WAY, 3–5.

What constitutes defect in highway under R. L. c. 51, §§ 1, 18, see WAY, 6–12.

It seems that one driving automobile on highway without being properly registered is not a traveller thereon within protection of R. L. c. 51, § 18, see AUTOMOBILE.

Under R. L. c. 51, § 19, a trench four feet long and one and one half feet deep cut for drainage in snow and ice which cover a street cannot be found to be a defect in highway, see WAY, 12.

Facts held to show actual knowledge of infirmity in title of one negotiating check of municipal corporation taking case out of R. L. c. 73, § 73, see BILLS AND NOTES, 6, 7.

What constitutes carrying on business of pawnbroking within R. L. c. 102, §§ 33, 38, see PAWNBROKER, 1, 2.

Return of transactions of pawnbroker required by R. L. c. 102, § 42, as amended St. 1907, c. 211, to be furnished to licensing board is not a public record within R. L. c. 35, § 17, see PAWNBROKER, 3.

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Statute (*continued*).

Nor is it within the definition of a public record in R. L. c. 35, § 5, see PAWNBROKER, 4.

St. 1902, c. 406, providing that actions of tort for injuries to the person against counties, cities and towns shall be commenced only within two years includes husband's action at common law for loss of wife's services and society and expense for medical attendance resulting from injuries to her person, see LIMITATIONS, STATUTE OF, 3.

Action of tort by husband for consequential damages by reason of personal injuries to wife is not an action for "damage to the person" under R. L. c. 171, § 1, and does not survive, see HUSBAND AND WIFE, 4.

Who is a hawker and pedler under R. L. c. 65, § 18, see HAWKERS AND PEDLERS.

Staging constructed by employees of painter from blocks, ladders and falls which are assembled for each job and then separated may be "ways, works and machinery" within R. L. c. 106, § 71, cl. 1, see NEGLIGENCE, 13.

"The negligence of an employer himself" for which he is liable under R. L. c. 106, § 73, does not include negligence of one to whom employer delegates duty of maintaining machinery in safe condition; such negligence is covered by the succeeding words of § 73, see NEGLIGENCE, 16.

Right of administrator of one killed by cause within R. L. c. 106, § 71, to give under certain circumstances notice required by R. L. c. 106, § 75, is not vested in administrator until he is appointed, see NEGLIGENCE, 5.

Notice of accident signed in his own name by attorney for sister of one killed, although sister was afterwards appointed administratrix, is not sufficient to comply with R. L. c. 106, § 75, see NEGLIGENCE, 4.

No remedy is given by R. L. c. 106, §§ 71–73, to father for expense of attendance to minor son made necessary by injuries for which employer is liable to son under the act, see EMPLOYERS' LIABILITY ACT.

What condition of domestic insurance company renders its further proceeding with business hazardous to policy holders and warrants issue of absolute injunction upon application by insurance commissioner under R. L. c. 118, § 7, see INSURANCE, 1.

What constitutes insolvency of domestic insurance company within rule of R. L. c. 118, § 1 (re-enacted St. 1907, c. 576, § 1), see INSURANCE, 2.

R. L. c. 122, § 11, deprives telegraph company of defense arising from contractual limitation of liability as to damages not exceeding $100 which otherwise are recoverable at common law, see TELEGRAPH, 5, 7.

Telegraph company may waive provision of R. L. c. 122, § 11, see TELEGRAPH, 6.

Lease of land for five years with covenant to renew for further term of five years is a lease for more than seven years within R. L. c. 127, § 4, see LANDLORD AND TENANT, 3.

Provisions of R. L. c. 129, § 12, in regard to the termination of a tenancy at will by a notice to quit are immaterial where landlord terminates tenancy in some other legal manner, see LANDLORD AND TENANT, 1.

R. L. c. 152, §§ 28, 29, do not give Superior Court jurisdiction to entertain, in a divorce proceeding, petition by libellee in nature of equitable replevin, see MARRIAGE AND DIVORCE, 1–4.

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To make valid arrest under R. L. c. 168, § 1, defendant, at time affidavit is made, must be actually within borders of Commonwealth having intention to leave it, see ARREST, 2, 3.

Provisions of R. L. c. 168, § 1, with regard to arrest on mesne process are not to be extended by construction, see ARREST, 1.

Consideration of R. L. c. 173, § 80, which requires that "the courts shall not charge juries with respect to matters of fact," see PRACTICE, CIVIL, 14, 15.

Under R. L. c. 201 as amended, (St. 1905, c. 370,) relating to claims against Commonwealth, there is no authority to appoint an auditor, see PRACTICE, CIVIL, 1.

R. L. c. 212, § 27, makes criminal any unnatural and lascivious act with another person, see LEWDNESS.

Under St. 1905, c. 308, assignment made February 23, 1906, of wages to be earned before April 20, 1907, executed by one acting under power of attorney given December 5, 1904, is invalid as purporting to assign earnings for a period "exceeding two years from the date" of the "power of attorney under which" it was made, see ASSIGNMENT.

St. 1906, c. 372, expressly covers all cases in which usurping by domestic corporation of unauthorized privileges is not so serious as to call for forfeiture of charter; and, since adequate relief is given thereby, quo warranto cannot be maintained in such a case, see CORPORATION, 2.

St. 1906, c. 463, Part I. § 8, does not limit authority of Attorney General to bring proceedings to restrain illegal acts of railroad or street railway corporation where public interests require, see ATTORNEY GENERAL.

Alien who has domicil in this Commonwealth, can be convicted under St. 1906, c. 501, for neglecting to provide for support of minor child although child never has been in this Commonwealth and was abandoned by the defendant in a foreign country seven years before the complaint, see PARENT AND CHILD, 1.

Whether, on complaint under this statute, domicil of defendant as distinguished from temporary residence is material, *quaere*, see PARENT AND CHILD, 2.

As to powers of mayor of Cambridge relative to stations in subway to be built under St. 1906, c. 520, see BOSTON ELEVATED RAILWAY.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See p. 751.

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STREET COMMISSIONERS.

Questions as to assessment by street commissioners of betterment assessments on estates abutting Columbia Road in Boston, see TAX, 6–8.

STREET RAILWAY.

Where street railway corporation is guilty of violation of law Attorney General is not compelled by St. 1906, c. 463, Part I. § 8, to await action of railroad commissioners before instituting such proceedings as situation may demand, see ATTORNEY GENERAL.
Suit against street railway and railroad corporations jointly where concurring negligence of employees of each contributed to causing collision, see NEGLIGENCE, 46.
Injury to passenger, see NEGLIGENCE, 19–25.
Injury to one driving across tracks, see NEGLIGENCE, 26.
Injury to pedestrian crossing tracks, see NEGLIGENCE, 30.
Injury to workman engaged in resurfacing street, see NEGLIGENCE, 31.
Custom of motormen to ring gong when workmen engaged in resurfacing street were near tracks held not to be shown to have been established, see NEGLIGENCE, 31.

SUBWAY.

Duty of railway corporation which operates trains through subway to keep stairways used by passengers in safe condition, see NEGLIGENCE, 19, 20.
For authority of mayor of Cambridge as to stations in subway to be constructed under St. 1906, c. 520, see BOSTON ELEVATED RAILWAY.

SUMMARY PROCESS FOR POSSESSION OF LAND.

Lessee who, having notified lessor of election to purchase in accordance with provision of lease, is holding over while seeking in good faith to have price determined by arbitrators as agreed and sale consummated within a reasonable time, is not liable to be ejected by summary process under R. L. c. 181, see LANDLORD AND TENANT, 8.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

Superior Court has, under R. L. c. 201, as amended by St. 1905, c. 370, giving it jurisdiction of claims against Commonwealth, no authority to appoint auditor, see PRACTICE, CIVIL, 1.
Under R. L. c. 152, § 29, jurisdiction in equity given to Superior Court in

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divorce proceedings includes only matters which are part of or incident to such a suit, see MARRIAGE AND DIVORCE, 1.

Neither under R. L. c. 152, § 29 or § 23, has it jurisdiction to entertain in divorce proceedings petition in nature of equitable replevin by which it is sought to regain possession of separate property, see MARRIAGE AND DIVORCE, 2–3.

For illustration of rule, see MARRIAGE AND DIVORCE, 4.

First Monday in every month is day for entry of appeals, see PRACTICE, CIVIL, 20.

But entry made before the day which is in all other respects regular and complete may be treated as taking effect upon the day, see PRACTICE, CIVIL, 21.

When creditor of insolvent estate of deceased person appeals to Superior Court from decision of commissioners upon his claim reported to Superior Court, and fails to file at time of entry statement of claim as required by R. L. c. 142, § 13, judge of Superior Court may permit him to file such statement at any time thereafter, see PRACTICE, CIVIL, 22.

Superior Court Rules, see PRACTICE, CIVIL, 16, 19.

SUPREME JUDICIAL COURT.

Jurisdiction of this court under St. 1906, c. 372, upon information in equity in name of Attorney General to restrain *ultra vires* act of domestic corporation, see CORPORATION, 2.

First Monday in every month is day for entry of appeals, see PRACTICE, CIVIL, 20.

But an entry made prematurely but otherwise regular and complete may be treated as taking effect upon the day, see PRACTICE, CIVIL, 21.

SURETY.

Where mortgagor conveys equity of redemption to one who takes subject to mortgage but does not assume mortgage debt, and, by reason of binding agreement between mortgagee and purchaser to which mortgagee does not assent, mortgagee delays foreclosure after maturity of mortgage debt, this operates to release mortgagor from liability upon mortgage note to extent of any depreciation in value of land between maturity of mortgage and date of foreclosure, see MORTGAGE, 1.

SURVIVAL OF SUITS.

See HUSBAND AND WIFE, 4; PRACTICE, CIVIL, 8.

TAX.

Assessment.

1. The salary of an officer of the federal government, after it has been paid and has come into the possession of the officer, loses its identity as salary

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Tax (*continued*).

and becomes liable to taxation by the Commonwealth under the general law. *Dyer* v. *Melrose*, 99.

2. The law of equitable conversion ought not to be invoked merely to subject property to taxation, especially when the question to be determined is one of jurisdiction over property as between States. *McCurdy* v. *McCurdy*, 248.

Upon Collateral Legacies and Successions.

3. The only ground on which the tax provided by R. L. c. 15, § 1, relating to the taxation of collateral legacies and successions, can be imposed upon the succession to property of a non-resident testator is that the property is within the jurisdiction of this Commonwealth at the time of the testator's death; and, where such a testator dies leaving real estate in this Commonwealth subject to a mortgage, the value of the testator's interest in the real estate at the time of his death is only the value of the equity of redemption, and that alone is subject to the tax. *McCurdy* v. *McCurdy*, 248.

4. A testator domiciled in another State died seised of real estate in this Commonwealth which was subject to a mortgage held by a creditor here, and also left other property insufficient in amount to satisfy the mortgage. The executor of the will brought a bill in equity for instructions as to whether the tax on collateral legacies and successions, provided by R. L. c. 15, § 1, should be assessed upon the value of the real estate without deducting the amount of the mortgage or only upon the value of the equity of redemption. *Held*, that the executor could not be compelled to bring the proceeds of personal estate from the place of domiciliary administration in another State to pay off the mortgage here in order to leave the property free from incumbrance and subject to a tax on its full value. *Ibid.*

5. A testator who died before January 5, 1904, by his will devised certain real estate and personal property for life to one who was not related to him, but made no disposition of the remainder. His heirs at law and next of kin at the time of his death were a brother and a nephew, the son of a deceased sister. The brother, after conveying his interest in the estate, died before the termination of the life estate. *Held*, that the life interest was subject to the tax on collateral legacies and successions under R. L. c. 15, § 1, to be assessed under § 16 of that chapter and to be paid by the administrator who then under § 5 could collect from the holder of the life estate so much as was due on the life interest; *also*, that the half of the remainder which vested in the brother was not subject to such a tax; and, *also*, that, by the provisions of R. L. c. 15, §§ 1, 4, and of St. 1902, c. 473, as amended by St. 1903, c. 276, the half of the remainder which vested in the nephew was subject to such a tax, to be paid by the nephew at the time when his estate vested in possession, and to be assessed upon the value of his estate at that time, except that at his option it might be paid at any time earlier upon a valuation then ascertained after deducting the value of the life estate; but that, if the nephew had not given the bond prescribed by St. 1903, c. 276, conditioned upon the pay-

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ment of the tax when his estate should become vested in possession, then the administrator, at the expiration of two years from the death of the testator, should pay so much of such tax as was assessed upon the value of the nephew's interest in the personal property. *Dow* v. *Abbott*, 283.

See also *ante*, 2.

Betterment.

6. St. 1906, c. 393, § 9, relating to the assessment of betterments for street improvements in Boston, provides as follows: "This act shall not apply to any such improvement completed . . . before the passage of this act, nor to any such improvement ordered before the passage of this act so far as the act requires that said board of street commissioners shall estimate on the same day on which the order for the improvement is passed the benefit . . . to each parcel of real estate. . . . All such improvements ordered to be made before [the date when St. 1902, c. 521, went into effect], the construction of which was not completed until after that date, are to be assessed under this act or under [that]. . . ." *Held*, that these provisions permit an assessment of benefits accruing to estates abutting on Columbia Road, a street in Boston, an order for the laying out and construction of which was passed in 1897, and the work of constructing which was finished in 1905. *Morse* v. *Street Commissioners*, 292.
7. St. 1906, c. 393, §§ 5–9, relating to assessments for special benefits which accrue to certain land in Boston from the laying out, construction or improvement of streets beyond the benefit which accrues to other real estate in the city, are constitutional, and assessments made thereunder within two years after the work of construction of a certain street was completed in 1905, the order laying out the street having been made in 1897, are legal, although the ownership of the land may have changed since the order laying out the street, or even since the completion of the work and before the assessment, the tax being assessed upon the land and not upon the owner. *Ibid.*
8. Acting under St. 1906, c. 393, § 5, relating to the assessment of the benefit accruing to each parcel of real estate beyond the general advantage to all real estate in the city from the laying out and construction or improvement of a street in Boston, the board of street commissioners determined that the total value of the special benefit resulting from the laying out and construction of a certain street was $300,000, which was less than one third of the amount which the city had had to pay for land damages alone, and, not deeming it necessary, did not consider the amount or the legality of the expenditures made in the course of construction by the superintendent of streets. One upon whose land an assessment for benefits was made petitioned for a writ of certiorari to quash the proceedings of the board, alleging that there had been illegal and improper expenditures by the superintendent of streets. *Held*, that the objection to the assessment could not prevail since in this case, the total amount of the assessment being less than the cost of the construction exclusive of the expenditures, the legality and propriety of which were questioned, the

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question of whether or not there were such illegal and improper expenditures was immaterial. *Morse* v. *Street Commissioners*, 292.

Where order for laying out street, made under law authorizing assessment of betterments after legal notice, allows no damages to one whose land is taken and makes no declaration on the subject, it is an adjudication that no one is entitled to damages and is an estimate of damages within R. L. c. 50, § 4, after which it is too late for abutter to elect to surrender whole of his land under that section, see DAMAGES, 1.

Exemption.

Salary of officer of federal government, after it has been paid and has come into possession of officer loses its identity as salary and becomes liable to taxation by this Commonwealth, see TAX, 1.

Sale.

9. In a sale of land for non-payment of taxes, if the notice of the sale describes the property as the whole of one lot and parts of two other lots shown on a plan on file in the registry of deeds, but no boundaries or divisional proportions are given of the parts of the subdivided lots that are to be sold, and the plan fails to show any subdivision of these lots, the notice is bad and the sale is illegal, and no title can be acquired by a collector's deed given in pursuance of such sale. *Williams* v. *Bowers*, 565.

TELEGRAPH.

1. A condition, imposed by a telegraph company and made a part of its contract with the sender of a message, that the company shall "not be liable in any case" for mistakes in the transmission or delivery or for non-delivery of the message "where the claim is not presented in writing within sixty days after the filing of the message," is reasonable and valid. *Wheelock* v. *Postal Telegraph Cable Co.* 119.
2. Where a telegraph company, for an additional charge equal to one quarter of its regular rate, gives to a person desiring to send a message an opportunity of insuring correct transmission by having the message repeated, a limitation of liability for non-delivery of, or mistakes in the transmission or delivery of, the message, imposed by it as a condition upon which it will accept an unrepeated message and made a part of its contract with the sender of such message, is reasonable and precludes the sender from recovering damages for such non-delivery or mistakes occurring by reason of negligence of the company which does not amount to wilful misconduct or gross negligence. *Ibid.*
3. Whether anything less than a reckless and wanton disregard of known duties could be considered as amounting to the gross negligence which, on the part of a telegraph company, would render ineffectual a reasonable condition contained in its contract with the sender providing for a limitation of the liability for failure to transmit a message, *quaere*. *Ibid.*

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4. Evidence tending to show that a telegraph company, with whom was filed in Boston a message in cipher to be delivered in Australia, the company previously having been informed that the sender, a regular customer, was a wool merchant and was likely to suffer financial loss if his messages were not delivered properly, and the sender stating to the company's agent that the message in question was "very important and must be transmitted correctly," did not transmit the message beyond New York, is not sufficient to prove the gross negligence on the part of the company which is necessary to make ineffectual a valid limitation of its liability for non-delivery, which was made a part of its contract with the sender. *Wheelock* v. *Postal Telegraph Cable Co.* 119.

5. In an action of contract or tort against a telegraph company for failure to transmit a message delivered to it for transmission by the plaintiff under a contract limiting the liability of the defendant for errors in transmission or non-delivery of such a message, the defendant by the provisions of R. L. c. 122, § 11, is deprived of the defense of such limitation as to damages not exceeding $100. *Ibid.*

6. In an action of contract or tort against a telegraph company for failure to deliver a message filed with it by the plaintiff in Boston on January 9 for delivery in Australia, it appeared that the defendant received the message subject to the condition, which was a part of its contract with the plaintiff, that it would not be liable upon any claim for damages resulting from non-delivery of the message "where the claim" was "not presented in writing within sixty days after the filing of the message"; that the plaintiff first learned of the non-delivery of the message on February 23 and immediately interviewed the defendant's general manager, seeking an explanation, and he wrote to the plaintiff the next day stating that he had instituted an investigation and that a full report would be "delayed some weeks." Ten days later a representative of the defendant tendered to the plaintiff the amount of tolls he had paid for the message and the tender was refused. On April 4 the defendant wrote the plaintiff a letter stating that "the full extent of" its liability was the tolls which the plaintiff had paid. Thereafter, for the first time, the plaintiff consulted counsel who sent to the defendant on April 12 a written claim for damages, to which the defendant replied on May 14, saying that it had never received any claim from the plaintiff but had received an oral complaint, and renewed the offer to refund the tolls. On June 1, the defendant wrote the plaintiff's counsel stating that the plaintiff had no legal or equitable claim against the defendant beyond the amount of the tolls. *Held*, that there was evidence for the jury on the question whether the defendant had waived its right to rely on the condition in the contract limiting the time within which the plaintiff's claim should be presented in writing, as well as its right to rely on the provision to the same effect in R. L. c. 122, § 11, the provision in the statute being one which the defendant might waive since it was inserted solely for the benefit of telegraph companies. *Ibid.*

7. The provisions of R. L. c. 122, § 11, with regard to the liability of a telegraph company for damages not exceeding one hundred dollars result-

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ing from its negligence in the transmission of a message notwithstanding a limitation of liability in its contract with the sender, do not change the rule of the common law for estimating such damages, that, where there is nothing in the transaction with the sender to bring home to the company knowledge or information as to any particular damage which will be likely to result from a mistake in transmission of the message, the damages that can be recovered are only the expense of sending it. *Wheelock* v. *Postal Telegraph Cable Co.* 119.

8. At the trial of an action of contract or tort against a telegraph company for failure to transmit a message filed with it by the plaintiff in Boston for transmission to Australia, there was evidence tending to show that, at different times before the filing of the message by the plaintiff, he had informed the defendant that he was a wool merchant and that mistakes and delays in sending his messages would cause him financial loss. It further appeared that the defendant would insure correct delivery of any message by repeating the message on payment of an extra charge of one quarter of the original charge, that the message in question was an unrepeated message and was in cipher and that, at the time it was delivered to the defendant's agent, he was "cautioned" by the plaintiff "that it was very important and must be transmitted correctly." It was admitted that the message never was transmitted. *Held*, that there was nothing to show that the probability of special damages to the plaintiff as a result of a failure to transmit the message was within the contemplation of the parties when the message was received by the defendant for transmission, and that therefore the plaintiff was limited in his recovery to his expense in sending the message. *Ibid.*

TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

TENDER.

One who seeks to recover for breach of agreement to purchase real estate must show tender of deed or that conduct of other party excused him from making tender, see CONTRACT, 10.

TOWN MEETING.

Discussion by RUGG, J., of the character of town meetings. *Wood* v. *Milton*, 531.

TOWNS.

See MUNICIPAL CORPORATIONS.

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TRESPASS.

Mortgagee of personal property, who has right to possession on account of breach of condition, has no right to enter close of another person for purpose of taking the property, see MORTGAGE, 2.

Judgment in action of trespass as evidence of eviction of defendant therein from use of a way, see COVENANT, 1, 2; RES JUDICATA.

In action by purchaser of property from a trustee in bankruptcy, who was in possession, against mortgagee who, having attempted foreclosure before mortgagor's bankruptcy, entered premises, removed a partition which he claimed under the mortgage, injured certain goods, and also took and carried away certain property not covered by the mortgage, refusal of judge to require the plaintiff to elect between a count in nature of trover and one in nature of trespass was right, see PRACTICE, CIVIL, 7.

TROVER.

In action by purchaser of certain property from a trustee in bankruptcy, who was in possession, against mortgagee who entered premises, removed a partition which he claimed under mortgage, injured certain goods and carried away property some of which was not covered by mortgage, it was held that judge was right in refusing to order purchaser to elect between a count in nature of trespass and one in nature of trover, see PRACTICE, CIVIL, 7.

TRUST.

Duties and Powers of Trustee.

A testator's family for several years before his death had consisted of himself, his wife, who was deaf and infirm, a first cousin named Mary, a second cousin Irene and Irene's daughter, all being supported and maintained by him without discrimination. Mary was interested with him in a retail dry goods business, and both she and Irene worked in his store and also devoted themselves, without compensation excepting their living, to the care of the household and of the testator's wife. By his will, the testator placed practically all of his property in trust and, among other things, gave directions to his trustee "that my homestead with its appurtenances and furniture and necessary provisions be held for the use of my wife and other members of my family, namely," Mary, Irene and Irene's daughter, "so long as any one of them shall be living and shall desire to occupy the same." The testator's wife and Mary died after the testator. On a bill in equity brought by the trustee for instructions, it was *held*, that it was the duty of the trustee to keep the homestead and its appurtenances in repair and to maintain the furniture by repair and renewal in as good condition, for the use of the two remaining members of the family, as it was in at the time of the testator's death, and to furnish to them necessary provisions to supply food but not to pay their individual

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expenses nor the other expenses of housekeeping or of maintaining a home. *Searles* v. *Fieles*, 343.

Construction.

Construction of direction in will establishing trust that homestead with furniture and necessary provisions should be held for the use of persons named, see *ante*.

Deed construed to give grantee fee in trust for grantor, there being a use upon a use which was not executed by the statute, see DEED.

Charitable Trust.

Gift to executors in trust to convey and transfer to such institutions or natural persons as they may select to be held by such donees in trust to be applied to charitable objects is valid gift to charity, see CHARITY, 1, 2.

Where gift is made by will not for general charitable purpose for a specific charity which has become impossible of performance, doctrine of *cy pres* does not apply and gift fails, see CHARITY, 3.

In such case it becomes unnecessary to consider whether specific purpose was such as to make perpetual trust valid, see CHARITY, 3.

Unrecorded Trust concerning Land.

Holder of mortgage taken in good faith upon real estate conveyed in fraud of creditors to mortgagor which has not been recorded at date of fraudulent grantor's adjudication in bankruptcy cannot retain mortgaged real estate against fraudulent grantor's trustee on ground that trust was created as under R. L. c. 147, §§ 1-3, an unrecorded trust concerning land does not affect rights of trustee, see BANKRUPTCY, 2.

Use upon a Use.

Example of a use upon a use, not executed by the statute, see DEED.

Dry Trust.

Where legal title to money paid into court is in plaintiff but only as trustee for claimant to whom plaintiff if he received the money must at once pay it over, verdict ordered for claimant will not be set aside, see PRACTICE, CIVIL, 26.

Order on trustee given in payment of debt, see BILLS AND NOTES, 3.

UNLAWFUL ARREST.

See ABUSE OF LEGAL PROCESS; ARREST, 2, 3.

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UNNATURAL AND LASCIVIOUS ACT.

See LEWDNESS.

USES, STATUTE OF.

Example of a use upon a use not executed by the statute but creating express trust, see DEED.

WAIVER.

By telegraph company of condition of contract that claims for mistake in transmission or non-delivery of message must be made within sixty days, see TELEGRAPH, 6.

And of provision of R. L. c. 122, § 11, to that effect, see TELEGRAPH, 6.

Where a proper notice to quit has been given tenant at will *it is doubtful* whether subsequent negotiations for making of lease for term to begin on termination of tenancy at will, which are broken off without making lease, no occupancy except under lease being discussed, can constitute waiver by landlord of his rights under the notice to quit, see LANDLORD AND TENANT, 2.

Waiver of defect in pleadings by consenting to filing of defective pleading and remaining silent until evidence is offered in support of it, see PLEADING, CIVIL, 4.

Where plaintiff has been erroneously allowed to read to jury interrogatories to which refusal to answer was made on ground that they were immaterial other party does not waive its exception by attempt in argument to justify refusals, see PRACTICE, CIVIL, 6.

WARRANTY.

Breach of covenant of warranty by eviction under paramount title of grantee from use of right of way appurtenant to land conveyed, see COVENANT, 1.

Judgment in action of trespass against such grantee is when properly supplemented admissible as evidence of eviction, see COVENANT, 2.

But, although it is shown that grantor was tendered defense of action of trespass, mere fact that there was judgment against grantee does not estop grantor to deny eviction, see RES JUDICATA.

WASTE.

Landlord held to have assented to alterations which otherwise would have been waste, see LANDLORD AND TENANT, 5.

WATERCOURSE.

1. A riparian owner who alleges that his land has been injured by the obstruction of a stream which he has a right to have kept open as a

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watercourse, in order to maintain an action of tort for the alleged injury, need not show actual damage in his present use of the land. It is enough if it appears that an injurious effect is produced upon his property by the maintenance of the obstruction such as to diminish its value if the obstructor by lapse of time should acquire a right to maintain the obstruction. *Stimson* v. *Brookline*, 568.

2. If the land of a riparian owner is injured by the obstruction of a stream which he has a right to have kept open as a watercourse, his remedy by an action of tort against the obstructor is not taken away or diminished by showing that the land of all the other riparian proprietors in a like position on the river suffered similar damage from the same cause. *Ibid.*

3. If an ancient ditch or waterway, connecting two parts of a winding river, was constructed in 1652 or 1653 in pursuance of a vote of a town, and then ran in a part or all of its course through common land, and if when the ditch was cut the water of the river flowed through it without artificial aid and thereafter there was water in it a part or all of the time in every year, until it was dammed, it having at times a large flow, the stream running through such ditch can be found to have acquired the character of a natural watercourse, so that one who owns land on the river below the upper opening of the ditch, whose land is flooded, because of the damming of the outlet through the ditch, has a remedy in tort against the constructor of the dam. *Stimson* v. *Brookline*, 568.

WAY.

Private.

Eviction of grantee from use of right of way appurtenant to land conveyed as breach of covenant of warranty, see COVENANT, 1.

Judgment in action of trespass against such grantee is when properly supplemented admissible evidence of eviction, see COVENANT, 2.

See also RES JUDICATA.

Public.

Obstruction of highway.

1. A license or permit to carry on the business of hawker and pedler, properly issued by authorities duly empowered to issue it, does not justify the holder thereof in maintaining a lunch wagon for hours at a time at one place within the limits of a highway. *Commonwealth* v. *Morrison*, 199.

2. The maintenance for personal profit within the limits of a highway of a lunch wagon consisting of a room set upon wheels containing a lunch counter and seats for customers, a stove, an urn for making coffee and windows through which, as well as at the counter, customers were served, which was drawn by a horse to a certain place upon the highway each night except Sunday at 6.30 o'clock and remained there until 5 o'clock the next morning, the horse being removed in the meantime, was *held* to be an obstruction of the easement of the public to the use of the way, and therefore not to be justified although the owner of the lunch wagon had

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received a permit from officers of the municipality in which the highway was who assumed to act under authority conferred by an ordinance, there having been no legislative authority for the ordinance. *Commonwealth* v. *Morrison*, 199.

Layout, construction and acceptance.

Where vote of town upon question of accepting a street as "laid out by the selectmen" is "to indefinitely postpone", that is a final rejection of the layout and requires further action by selectmen before town can vote again on the proposition, see MUNICIPAL CORPORATIONS, 3.

An order for laying out a street, made by a city council, under the law authorizing the assessment of betterments, after proper notice in accordance with R. L. c. 48, which takes part of the land of an abutter without allowing any damages to him or making any declaration on the subject, is an adjudication that he is not entitled to any damages which is an "estimate of damages", and after such adjudication it is too late for the abutter to elect to surrender the whole of his land under R. L. c. 50, § 4, which requires notice in writing of election to surrender "before the estimate of damages is made," see DAMAGES, 1.

See also TAX, 6–8.

Defect in Highway.

Carriages.

3. The "carriages" referred to in R. L. c. 51, § 1, requiring cities and towns to keep public ways reasonably safe at all seasons for travellers "with their horses, teams and carriages," are those drawn by animal power. *Doherty* v. *Ayer*, 241.

Automobiles.

4. An automobile is not a "carriage" within the terms of R. L. c. 51, § 1, requiring cities and towns to keep public ways reasonably safe and convenient at all seasons for travellers "with their horses, teams and carriages." *Ibid.*

5. Cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken in automobiles; but, if their ways are reasonably safe and convenient for travel generally, they are not liable for damage resulting from a failure to make special provisions which are required only for the safety and convenience of persons using automobiles. *Ibid.*

Duty to erect barrier.

6. At the trial of an action of tort against a town under R. L. c. 51, § 18, for damage to the plaintiff's automobile alleged to have been caused by a defect in the highway, it appeared that a street railway company in the process of laying its tracks had uncovered a level stretch of sand throughout the entire width of the way and extending for thirty feet to one side of the location of the way, and had obliterated the marks of travel, but allowed travel upon the way. The plaintiff's automobile was injured through becoming stuck in the sand, but there was conflicting evidence as to whether the accident happened within the travelled part, or entirely

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outside of the location of the way. The presiding judge instructed the jury that "it was not of any great importance whether the accident happened without the limits of the road, provided, in the opinion of the jury, the sand was a dangerous place, because the town would be obliged to properly protect travellers by barriers or otherwise against such a danger even if it were outside the limits of the highway." *Held*, that the instruction was erroneous, since there was no evidence of such a dangerous condition as to call for the erection of a barrier to keep travellers from passing out of the road; and that therefore the jury should have been instructed that, if the accident happened outside of the limits of the way, the defendant was not liable. *Doherty* v. *Ayer*, 241.

7. At the trial of an action of tort against a town to recover for injury alleged to have been received by the plaintiff because of an unsafe condition of a highway which the defendant was bound to keep safe for travel, it appeared that the plaintiff tripped over a stone which, though not in the highway, was in a beaten walk at one side which had the appearance of a part of the highway, and the plaintiff contended that the defendant should have erected a barrier to protect the travelling public from injury because of the stone. There was no evidence as to the size or shape of the stone. The judge presiding at the trial directed a verdict for the defendant. *Held*, that the verdict was directed rightly, since it did not appear that there was a condition beside the way such as to expose travellers to unusual hazard and from which they should be protected by a barrier erected by the defendant. *Shea* v. *Whitman*, 374.

What is a defect.

8. In a little used back road of a country town, on which the town has made repairs within six years, the combination of a stone projecting six or eight inches above the surface close to a wheel rut and within a short distance a sharp stone jutting into the wheel rut, a place where a wheel is likely to get caught and a third stone against which the wheel of the wagon of a traveller strikes, throwing him out of the wagon, if this state of things is shown to have existed for two years, can be found to constitute a defect in the way of making the town liable to the traveller thus injured. *Thompson* v. *Bolton*, 311.
9. A hole in the concrete of a sidewalk which has existed for more than a year, caused by cutting away the concrete in the removal of a lamp post, the excavation after the removal of the post having been filled with earth, which afterwards settled, leaving an uneven surface with the edges of the concrete "to a certain extent rough and rounded," may be found to be a defect in a highway of a town. *Gallagher* v. *Watertown*, 467.
10. At the trial of an action against a city under Pub. Sts. c. 52, for injuries due to an alleged defect in a highway, there was evidence tending to show that the plaintiff, while rightfully upon the sidewalk of a highway on a dark night, stumbled upon a piece of iron piping protruding eight or nine inches above the sidewalk and two or three feet from the curb, and fell, sustaining the injuries complained of, that there were no lights or warnings against using the sidewalk, although the roadway of the street was

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closed by wooden horses because of construction work going on there, that, previous to the accident, the water department of the city had placed the pipe as it was when the plaintiff stumbled upon it and that it had remained in that condition. *Held*, that there was evidence from which the jury were warranted in finding for the plaintiff. *Jones* v. *Boston*, 66.

11. At the trial of an action against a city under R. L. c. 51, § 18, for personal injuries received by the plaintiff and alleged to have been caused by a defect in a highway, it appeared that the plaintiff was thrown from a wagon as he was driving diagonally across a street railway track in the highway because the tire of the forward left hand wheel of his wagon, which protruded beyond the felloe, caught under the edge of the flange of a rail at a point where the flange had been cut away to permit a grating to be placed between the tracks, and that the grating, with the surface of the street, then had sunk below the flange. There was evidence that, if the grating and rail had remained as they were when the grating originally was placed, the accident could not have happened. *Held*, that the defendant was liable if the jury found that the construction and condition of the highway were improper and unnecessary, either as to original construction or later condition, and that there was evidence from which the jury could make such a finding. *Cammett* v. *Haverhill*, 76.

Ice and snow.

12. Under R. L. c. 51, § 19, providing that a city or town shall not be liable for an injury upon a way "by reason of snow or ice thereon," an excavation four feet in length and about one and a half feet in depth cut through the snow and ice above the surface of a street of a city, near the curb, for the purpose of allowing surface water to drain into a catch basin, cannot be found to be a defect in the way. *Hadden* v. *Somerville*, 480.

Who is traveller on highway.

It seems that one injured by reason of defect in highway while driving an automobile thereon without proper license cannot recover under R. L. c. 51, § 18, see AUTOMOBILE.

But fact of proper license will be presumed until contrary is shown affirmatively, see AUTOMOBILE.

Pleading and practice.

Requirements of declaration where defect alleged is failure to erect barrier to protect travellers from dangerous conditions near highway, see PLEADING, CIVIL, 1.

Action against municipality for defect in highway may be ordered to be tried together with action by same plaintiff against individual for maintaining a nuisance where they depend upon same facts, see PRACTICE, CIVIL, 8.

WILL.

Soundness of Mind.

1. On the issue of the soundness of mind of a testatrix, witnesses other than the attesting witnesses of the will and the family physician of the testa-

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trix, who are neither alienists nor physicians but who knew the testatrix intimately for a considerable period of time extending sufficiently near to the time of the execution of the will to make their observation of facts competent, may be asked by the executor, expecting a negative answer, whether they ever saw the testatrix do or heard her say anything that indicated anything singular or unusual respecting her mental condition. *Gorham* v. *Moor*, 522.

Undue Influence.

2. Upon the trial of the issue of undue influence in proving a will, a declaration by the person charged with having procured the execution of the will by undue influence, that he did exercise such influence, is not evidence of that fact as against other parties in interest. *Gorham* v. *Moor*, 522.

Upon trial of this issue where one charged with exerting such influence has testified that he never talked with testator about will, previous statement that will was made in manner suggested by him may be introduced for purpose of impeaching his credibility, see WITNESS, 5.

Trial of Issues framed for Jury.

Where, in trial of issues, there has been error in rulings upon evidence as to one issue but other issue was tried properly, new trial will be granted only upon issue as to which there was error, see PRACTICE, CIVIL, 10.

WITNESS.

Refreshing Recollection.

1. In an action for personal injuries, where the plaintiff was treated for her injuries at a relief station of a hospital, a yellow paper and a white card were introduced in evidence without objection containing memoranda relating to the accident and to treatment at the hospital, the yellow paper being stated by a witness to be the accident report and the white card to be the clinical record. At the head of each of these papers was written the name and address of the plaintiff. A physician was called as a witness who testified that at the time of the accident he treated cases at the relief station, and that according to the practice at the relief station the contents of the yellow paper and the name and address at the head of the white card were written when the patient was brought to the station and that the white card accompanied the patient when brought to the accident room for treatment. He testified that all the writing on the white card introduced in evidence, except the name and address at the head, was his. It appeared that the person who wrote the name and address was dead. The witness testified that he did not know the plaintiff or whether he ever treated her and did not know the handwriting of the person who wrote her name and address on the white card. The presiding judge found that the handwriting on the yellow paper and of the plaintiff's name and address

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on the white card were the same. The plaintiff offered to prove that on the day of the accident there was no other person of her name at the relief station. The judge thereupon allowed the witness to refresh his recollection by the white card, and to testify about treating the person named on the card, and ruled that it was for the jury to say whether the person treated was the plaintiff or not. *Held*, that the ruling was right; there being no question of the right of the witness to refresh his recollection by a memorandum made by him at the time from his personal knowledge, and there being ample evidence that the person named on the card and treated by the witness was the plaintiff. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 314.

Direct Examination.

Upon issue whether testator had testamentary capacity, non-expert witness who was not attesting witness to will but had a sufficiently intimate acquaintance with testator may be asked by executor, expecting a negative answer, whether he ever saw testator do anything or heard him say anything which indicated anything unusual respecting his mental condition, see WILL, 1.

Cross-Examination.

2. In the trial of a petition for damages from the abolition of a grade crossing of a highway, where no land of the petitioner was taken and he is entitled to recover only such special and peculiar damage as differs in kind from that suffered by the general public and for that reason is not entitled to recover for any damage arising from the discontinuance of a portion of the street as a public way, it is within the discretion of the presiding judge to allow the respondent to ask the petitioner's expert witnesses in cross-examination whether in their judgment the decrease in the volume of travel by the elimination of the grades had not affected the market value of the estate, this exercise of discretion being proper, whether the question is regarded as an effort to ascertain the elements of damage upon which the opinion of the witnesses was based, or whether it is regarded as bearing upon a contention of the respondent that no damage had been suffered except that which arose from the discontinuance. *Hyde* v. *Fall River*, 4.

3. In the trial of a petition for damages from the abolition of a grade crossing of a highway, where no land of the petitioner was taken and he is entitled to recover only such special and peculiar damage as differs in kind from that suffered by the general public and for that reason is not entitled to recover for any damage arising from the discontinuance of a portion of the street as a public way, after expert witnesses for the respondent have given opinions expressly excluding any damages from the diminished travel or less convenient access because of the discontinuance, and the petitioner has been permitted to cross-examine the witnesses fully as to the basis upon which their opinions rest, it is a proper exercise of the discretion of the presiding judge to refuse to allow the petitioner to cross-examine the witnesses further for the purpose of obtaining from them an opinion as to how much the estimate given would be increased if damages

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Witness (*continued*).

for the discontinuance were included or to test their soundness of opinion by a comparison between the value given by them and the entire damage suffered from both sources or from the discontinuance alone. *Hyde* v. *Fall River*, 4.

Contradiction and Impeachment.

4. To impeach the credibility of a witness, evidence is admissible of a previous declaration made by him which contradicts his testimony in any material matter. *Gorham* v. *Moor*, 522.
5. Upon the trial of the issue of undue influence in proving the will of a testatrix, if the person charged with having procured the execution of the will by undue influence has testified that he never advised or talked with the testatrix about her will or had anything to do with the making of it, it may be shown, for the purpose of impeaching his credibility as a witness, that at another time and place he made a statement that the will was as he told the testatrix to make it. *Gorham* v. *Moor*, 522.
6. It is proper to exclude evidence of a previous declaration of a witness, which is offered to contradict his testimony, if the testimony sought to be contradicted has been corrected by the witness himself in his later testimony, so that the declaration offered is not in contradiction of his corrected testimony. *Ibid.*

Deceased.

Evidence of what witness at former trial who since has died testified to is competent at subsequent trial of same issues between same parties, see EVIDENCE, 5.

WORDS.

"Burden of proof." See *Soebel* v. *Boston Elevated Railway*, 46.
"Business." See *Commonwealth* v. *Schwartz*, 107.
"Carriages." See *Doherty* v. *Ayer*, 241.
"Charitable persons." See *Gill* v. *Attorney General*, 232.
"Claims for losses." See *Cutting* v. *American Ins. Co.* 131.
"Copulation." See *Commonwealth* v. *Delano*, 166.
"Damage to the person." See *Hey* v. *Prime*, 474.
"Employer himself." See *Rowley* v. *Ellis*, 391.
"Estimate of damages." See *Taintor* v. *Cambridge*, 412.
"Event causing the injury." See *Hatch* v. *United States Casualty Co.* 101.
"Fall due." See *Price* v. *Parker*, 1.
"Farm laborer." See *Rowley* v. *Ellis*, 391.
"Hawker and pedlers." See *Commonwealth* v. *Morrison*, 199.
"Hearing." See *McArthur Bros. Co.* v. *Commonwealth*, 187.
"Heirs at law." See *Boston Safe Deposit & Trust Co.* v. *Parker*, 70.
"In equal shares." See *Thompson* v. *Thornton*, 273.
"Injury to the person." See *Mulvey* v. *Boston*, 178.
"In open court." See *McArthur Bros. Co.* v. *Commonwealth*, 187.
"Liabilities." See *Price* v. *Parker*, 1.
"Liable." See *Price* v. *Parker*, 1.

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"Misconduct." See *Bar Association* v. *Hale*, 428.
"Necessary provisions." See *Searles* v. *Fieles*, 343.
"Net assets." See *Cutting* v. *American Ins. Co.* 131.
"Occupy or improve." See *Peaks* v. *Cobb*, 554.
"Owner." See *Burr* v. *Massachusetts School for the Feeble-Minded*, 357.
"Public Record." See *Allen* v. *Kidd*, 256.
"Receive for filing." See *Round* v. *Police Commissioner*, 218.
"Relatives." See *Thompson* v. *Thornton*, 273.
"Residuary legatee." See *Dann* v. *Canfield*, 591.
"To indefinitely postpone." See *Wood* v. *Milton*, 581.
"Trial." See *McDonnell, petitioner*, 252.

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STATUTES CITED AND EXPOUNDED.

STATUTES OF THE UNITED STATES.

1898, c. 541, § 67 a, d.	Bankruptcy	273
—— —— § 70 a.	"	490
—— —— § 70 a, 4, 5.	"	271

STATUTES OF MINNESOTA.

Gen. Sts. 1894, c. 76.	Corporation	449
—— —— §§ 5897, 5905, 5911.	"	458, 455
—— —— § 5906.	"	455
Gen. Laws, 1899, c. 272, §§ 1, 2.	"	454
—— —— § 8.	"	456

STATUTES OF THE COMMONWEALTH.

1786, c. 81, § 1.	Way	244
1795, c. 51.	Regulation of Carriages	202
1796, c. 32.	" "	202
1799, c. 31, § 7.	" "	202
1838, c. 85.	Putnam Free School	470
1842, c. 89, § 1.	Survivorship of Action	476
1847, c. 224, § 3.	Regulation of Carriages	202
1855, c. 304, § 7.	Married Woman	508
—— c. 283.	Statute of Limitations	182
1857, c. 249, §§ 1, 2.	Married Woman	508
1862, c. 181, § 2.	Insurance	142
—— c. 198, § 1.	Married Woman	509
—— —— § 2.	" "	510
1871, c. 361, § 3.	Worcester	142
—— c. 381, § 21.	Street Railway	78
1876, c. 22.	Auditor	142
1877, c. 178.	Equity Jurisdiction	66
—— c. 234, § 4.	Way	589
1878, c. 244.	Regulation of Carriages	202
1879, c. 255.	Claims against the Commonwealth	138
1881, c. 64, §§ 1, 3.	Married Woman	509
—— c. 236.	Way	589

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1885, c. 323, § 2.	Boston Board of Police 203
—— c. 384.	Practice 128
1886, c. 140.	Street Railway 396
1887, c. 246.	Claims against the Commonwealth 138
—— c. 270.	Employers' Liability Act 590
—— c. 383.	Practice 139
—— c. 436.	Lascivious Acts 166
1889, c. 439, § 4.	Metropolitan Sewerage Act 142
1890, c. 127, § 5.	Tax Appeal 142
—— c. 428, § 7.	Grade Crossing 142
1893, c. 407, § 7.	Metropolitan Park Commission 142
1894, c. 175.	Auditor 142
—— c. 416, § 3.	Boston, Highways in 295
1895, c. 488, §§ 13, 15.	Metropolitan Water Supply 142
1898, c. 578, §§ 11, 26.	Street Railway 79
1900, c. 418.	Auditor 140
1902, c. 406.	Limitation of Action 180
—— c. 473.	Collateral Legacies 288
—— c. 521.	Boston, Highways in 294, 296
1903, c. 164.	Gas and Electric Light Companies 557
—— c. 276.	Collateral Legacies 288
—— c. 437, § 84.	Corporation 142
—— c. 473.	Automobile 242
—— —— §§ 3–5.	" 247
1904, c. 206.	Estate of Absentee 279
—— c. 443, § 3.	Eminent Domain 414
1905, c. 263.	Contract Action 139
1905, c. 308.	Assignment of Wages 390
—— c. 311.	Automobile 247
—— c. 367.	Collateral Legacy Tax 288
—— c. 370.	Claims against the Commonwealth 139
—— c. 428.	Banking Associations 65
—— c. 444.	State Institutions 358
1906, c. 234.	Automobile 205
—— c. 291, §§ 4, 10.	Boston Licensing Board 203
—— c. 349.	Tax 142
—— c. 372.	Corporation 194, 198
—— c. 390.	Assignment of Wages 390
—— c. 393, §§ 2, 9.	Boston, Highways in 294
—— —— § 5.	" " 295
—— c. 463, Part I. § 8.	Railroad 199
—— —— —— § 39.	" 142
—— —— Part II. § 57.	" 196
—— —— —— § 80.	" 79
—— c. 501.	Parent and Child 92
—— —— § 5	" " 93
—— c. 520, § 3.	Boston Elevated Railway 574, 577
—— —— §§ 13, 14.	" " " 575, 577

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1906, c. 520, § 31.	Boston Elevated Railway	576
1907, c. 211.	Pawnbroker	219
—— c. 503, § 2.	Fire Escapes	411
—— c. 537, § 5.	Inspectors of Health	411
—— c. 576, § 1.	Insurance	135
—— ——— § 51.	"	142
1908, c. 360.	Way	199

REVISED STATUTES.

c. 25, § 1.	Way	245

GENERAL STATUTES.

c. 44, § 1.	Way	245
c. 63, §§ 98, 116.	Railroad	138
c. 115, § 5.	Charge	502
c. 127, § 1.	Survival of Action	475
c. 129, §§ 7–9.	Declaration	130
c. 182.	Repeal of Existing Laws	182

PUBLIC STATUTES.

c. 16, § 64.	Mechanic's Lien	360
c. 49, §§ 65, 67–71.	Way	533
c. 52.	"	66
—— § 1.	"	245
—— § 21.	"	589
c. 86, §§ 25, 26.	State Paupers	138
c. 113, § 32.	Street Railway	78
c. 147, § 11.	Husband and Wife	509
c. 153, § 5.	Equity Jurisdiction	262
c. 162, §§ 6–15.	Poor Debtor	96
c. 165, § 1.	Survival of Action	475
c. 167, §§ 7–9.	Declaration	130
——— § 94.	Negligence of Town	375
c. 195.	Claims against the Commonwealth	138

REVISED LAWS.

c. 6, § 77.	Mechanic's Lien	358, 360
c. 8, § 1.	Statutes	184
c. 12, § 80.	Tax	142
c. 13, § 38.	"	566
—— § 41.	"	567
c. 14, § 67.	"	142
c. 15, § 1.	Collateral Legacies	249, 288
—— §§ 2, 4, 5, 16.	" "	288
c. 25, § 15.	Town	205
c. 35, § 5.	Public Records	220, 259
—— § 17.	" "	219

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c. 42, §§ 25–38.
c. 48, §§ 3, 12.
—— §§ 60, 67, 79, 88, 94.
—— §§ 13, 14, 28, 68, 94.
—— §§ 65, 67–71.
—— § 109.
c. 50, § 4.
c. 51.
—— § 1.
—— §§ 10, 19, 23.
—— §§ 17, 19.
—— § 18.
—— §§ 20, 21.
—— § 21.
—— § 23.
c. 52, §§ 1–3.
c. 65, § 13.
c. 73, § 70.
—— § 73.
c. 74, § 1.
c. 87, §§ 113–123.
—— § 127.
c. 102, § 1.
c. 102, §§ 33, 38.
——— § 42.
——— §§ 43–45.
c. 104, §§ 41, 50.
c. 106, § 71.
——— —— cl. 1.
——— —— cl. 2.
——— § 73.
——— § 74.
——— § 75.
——— § 79.
c. 111, § 267.
c. 112, § 45.
c. 118, § 1.
——— § 7.
——— § 60.
c. 121, §§ 1, 5, 6, 8, 9, 14, 15, 26, 34, 35.
——— § 33.
c. 122, § 11.
c 127, § 4.
c. 129, § 12.
c. 133, § 1, cl. 5.

Public Schools 471
Way 413
" 414
" 414
" 533
" 142
Betterments 413, 414
Way 66
" 78, 244, 246
" 484
" 482
" 78, 242
" 184
" 588, 589
" 483
" 205
Hawkers and Pedlers 201
Negotiable Instruments 266
" " 603
Statute of Frauds 331
Massachusetts School for the Feeble-Minded 359
State Board of Insanity 359
Innholder 112
Pawnbroker 108
" 219
" 220
Inspection of Buildings 411
Employers' Liability Act 46, 397, 478, 552, 586
" " 395, 396, 550
" " 550
" " 46, 397, 478, 586
" " 478
" " 184, 588
" " 396
Railroad 35, 396, 578
Street Railway 79
Insurance 135
" 131
" 21
Gas and Electric Light Companies 558
" " " 557
Electricity 124
Conveyance 268, 272
Landlord and Tenant 330, 331
Curtesy and Dower 277

Digitized by Google

c. 140, § 3, cl. 2.	Distribution	277
c. 142, § 12.	Insolvent Estates	128
——— § 13.	" "	129
c. 144, §§ 10, 11.	Estate of Absentee	279
c. 147, §§ 1–3.	Trust	278
c. 152, §§ 23, 29.	Divorce	118
c. 153, § 10.	Husband and Wife	509
c. 156, § 3.	Supreme Judicial Court	197
c. 157, § 5.	Superior Court	142
c. 159, § 6.	Equity Jurisdiction	118
——— § 26.	" "	511
c. 165, §§ 55, 56, 59.	Auditor	140
c. 168.	Poor Debtor	98
——— § 1.	" "	26
——— §§ 6–15.	" "	96
——— §§ 7–15, 66.	" "	97
c. 169.	Bail	97
——— §§ 7, 8.	"	94
——— §§ 9, 10.	"	98
c. 171, § 1.	Survival of Action	183, 475
c. 173, § 6.	Declarations	494
——— § 11.	"	130
——— § 80.	Charge to Jury	502
——— § 81.	Priority of Engagement of Attorney	140
——— § 102.	Appeal	419
——— § 106.	Exceptions	378
——— § 108.	"	378, 602
——— § 112.	New Trial	255
——— § 130.	Forms of Pleading	375
c. 175, § 66.	Declarations of Deceased Persons	165
c. 181.	Writ of Entry	548
c. 187, § 22.	Foreclosure and Redemption	21
c. 192, § 6.	Quo Warranto	197
——— §§ 6–11.	" "	198
c. 194, § 7.	Arbitration	544
c. 201.	Claims against the Commonwealth	139, 142
c. 202, § 2, cl. 2.	Limitation of Action	180
——— § 13.	" "	348
c. 212, § 27.	Lascivious Act	166

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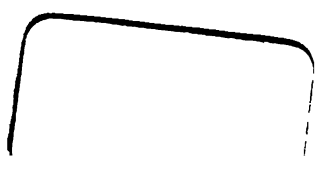

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